Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

JOHN and JANE DOE,
Former adoptive parents of the child Richard,

Petitioners,

v.

OTAKAR KIRCHNER,
Biological father of the child Richard,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Illinois Supreme Court err in holding that the Fourteenth Amendment mandates that the states deny a custody hearing to adoptive parents and their adoptive child after an adoption is vacated, and that custody automatically vests in the unwed biological father who has never supported or met the child?

2. Does a parent-child relationship of four years duration, formed under color of law, create a liberty interest requiring some form of particularized due process before a state can remove a four-year-old child from the only home he has known and from familial relationships established pursuant to an adoption order that was vacated years after the relationships were formed?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the original habeas proceeding in the Supreme Court of Illinois whose judgment is sought to be reviewed:

Otakar Kirchner,
Petitioner Below

John Doe and Jane Doe,
Respondents Below

Edward J. O'Connell as Guardian *ad Litem* for the minor child Richard,
Respondent Below

James Ryan, Attorney General of the State of Illinois,
Intervening Respondent Below

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IN THE
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JOHN and JANE DOE,
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To the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

Petitioners John and Jane Doe, husband and wife, formerly the adoptive parents of the child known as "Richard," respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Illinois granting a writ of habeas corpus requiring the immediate transfer of Richard to his biological father's custody.

OPINIONS BELOW

The opinion of the Illinois Supreme Court issued on February 28, 1995, relating to the grant of the writ of habeas corpus, is set forth in Appendix A. The writ of habeas corpus issued on January 25, 1995 and the orders accompanying the writ are set forth in Appendix B. The related opinions of the Illinois Supreme Court reversing the order terminating Otakar Kirchner's parental rights and denying rehearing in *In re Doe* are published at 638 N.E.2d 181 (Ill. 1994), and are set forth in Appendix C. The opinion of the Illinois Appellate Court affirming the trial court's finding of unfitness, terminating the parental rights of Otakar Kirchner, and affirming the adoption is reported at 627 N.E.2d 648

(Ill. App. Ct. 1993), and is set forth in Appendix D. The order of the trial court granting the adoption is set forth in Appendix E. The motion of Otakar Kirchner to intervene in the adoption proceeding is set forth in Appendix F.

JURISDICTION

On January 25, 1995, the Illinois Supreme Court issued a writ of habeas corpus ordering Richard turned over "forthwith" to his biological father, Otakar Kirchner. On February 28, 1995, the Illinois Supreme Court issued its opinion holding that neither Richard nor the Does could have standing to be heard regarding Richard's custody because Richard's biological father had not been found unfit and had not voluntarily relinquished custody of Richard. The Illinois Supreme Court rejected the Does and Richard's claim that under the United States Constitution, they could not be denied due process before the State of Illinois separated their family. The court accepted Kirchner's claim that the Constitution mandated that only his interests be considered. Therefore, the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the following constitutional provision, the pertinent portion of which is set forth below:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This petition seeks review of an original habeas corpus proceeding in the Supreme Court of Illinois. This was a purely legal proceeding, involving no fact finding. It resulted in the issuance of a writ of habeas corpus requiring the Does -- the former

adoptive parents of a four-year-old child known as Richard -- to turn Richard over "forthwith" to the custody of his biological father, Otakar Kirchner, who had never met Richard. The order effectively terminated a custody proceeding pending in a state trial court. The opinion of the Illinois Supreme Court, issued more than one month later, turned on the court's ruling that the only process required or permitted was the prior adoption proceeding. In that proceeding, the sole issue was whether the biological father was unfit. The Illinois Supreme Court held that because it had reversed the order terminating Kirchner's parental rights, the Federal Constitution prohibited any hearing that would consider Richard's custody or the impact upon the Does or Richard of separating Richard from the only family he has ever known. According to the Illinois Supreme Court, regardless of the fact that the Does had obtained custody pursuant to a state court order of adoption, vacated years later, Richard's biological connection to Kirchner creates an indefeasible federal constitutional entitlement in Kirchner to Richard. According to the Illinois court, Richard belongs to Kirchner, must be immediately transferred to Kirchner's home, and may then be denied by Kirchner any further contact with the Does.

The Adoption Proceeding

Richard was born to Daniela Janikova ("Janikova") on March 16, 1991. (Tr. 25(I).)[1/] Janikova was then unmarried and was not living with Kirchner. (Tr. 27(I).) Shortly before Richard's birth, Janikova had been living in a shelter for abused women. (Tr. 33(I); *see* App. 38a, 40a.) After she decided to place her unborn child for adoption, she was put in contact with the Does. (Tr. 35-36(I).) Janikova told the Does she wanted two parents for her

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[1/] There was no factual record in the original habeas corpus proceeding. Citations to the transcript are to the trial transcript in the previous adoption proceeding on May 5 and 6, 1992 and will be cited as "Tr. ___(Vol. #)." Citations to the adoption record will be to "R. ___." Citations to the appendix to this petition will be to "App. ___."

child. (Tr. 36-37(I).) The Does' attorney wrote to Janikova and urged her to disclose the father's name: "I encourage you again to disclose his identity to us or to Cook County Supportive Services for purposes of serving summons upon him so he is made aware of his legal rights or for purposes of having him consent to the adoption by his own willing act." (P. Ex. 1; *see also* Tr. 48-50(I).) Nonetheless, she refused to disclose the name of the biological father to the Does, to the Cook County Department of Supportive Services social worker who interviewed her, to the court, or to the guardian *ad litem* for Richard. (Tr. 26-27, 37-38, 58(I); App. 40a.)

Two days after Richard's birth, the Does filed a petition to adopt Janikova's baby. (R. C2-C4.) On March 20, 1991, Janikova signed a final and irrevocable consent to the adoption of the child. (R. C14; App. 88a.) All parties and the courts that have reviewed this case agree that Janikova's consent was valid and that she no longer has any parental rights with regard to Richard. (*E.g.*, App. 21a.) That same day, Richard went home from the hospital with the Does and their three-year-old biological son (R. C15-C16), and he has lived with them as part of their family ever since. Richard has never met Otakar Kirchner.

In March 1991, Kirchner was told by Janikova's uncle that the baby was dead. (Tr. 105-06(I); App. 40a.) He told Janikova's uncle in April that "the baby didn't die and [he was] going to hire a lawyer." (Tr. 105-06(I).) On May 12, 1991, Janikova moved back into Kirchner's apartment and told him that she had placed the baby for adoption and that "she made a mistake." (Tr. 47(I); 51-54(III); *see also* App. 41a.) Kirchner then met with an attorney (Tr. 91(I)), and on June 13, 1991, he filed a motion for leave to file an answer in the adoption proceeding. (App. 157a.) That motion did not mention his later claim that he was the father of the child. (*Id.*; App. 41-42a.) Although given leave (R. C32), Kirchner never filed an answer.

Kirchner took no further action until September 1991. On September 12, 1991, Kirchner married Janikova. (Tr. 27, 78-79(I);

see App. 40a.) Eight days later, when Richard was six months old, Kirchner filed the first paper asserting that he was Richard's father, a motion for leave to file a petition to declare paternity. (R. C37; *see* App. 40a, 42a.) Kirchner's paternity was established on December 9, 1991. (R. C46; *see* App. 42a.)

The only questions at issue during the adoption proceeding were whether the unwed father had paid for medical and hospital expenses and whether he had demonstrated a reasonable degree of interest, concern or responsibility as to the welfare of the new-born child during the first thirty days after birth. (R. C47-C50; Tr. 10-11(I).) Kirchner's defense was that impediments beyond his control disabled him from expressing an interest in the child: "namely, the deception of the natural mother regarding the status of the child." (Tr. 15(I); *see also* R. C58.) No issue was raised as to any action or inaction on the part of the Does.

The trial court found that Janikova's deliberate lies about the death of her child were "unconscionable." (Tr. 93(III).) Nevertheless, the trial court found that Kirchner's long delay in seeking counsel and in making any claim of paternity was "clear and convincing evidence that there was no reasonable degree of interest indicated by Kirchner in the first thirty days of the life of the child." (Tr. 93-94(III).) The May 13, 1992 order of the trial court provided that:

> from this day the minor shall, to all legal intents and purposes, be the child of the petitioners and, for the purpose of inheritance and all other legal incidents and consequences, the same as if born to them of their marriage.

(App. 152a.) Richard was then more than one year old.

Appeals From the Adoption Proceeding

The Illinois Appellate Court affirmed the judgment of adoption. (App. 123a.) The dissenting opinion objected to the termination of Kirchner's parental rights, noting that "[t]he interests of the child

are but one factor to be considered in a case of such a delicate nature." (App. 143a.) The dissent noted that although the Does were clearly Richard's psychological parents, Kirchner's parental rights could be upheld without requiring termination of the Does' custody rights. The dissent suggested that a range of custodial and visitation relationships was possible. (App. 148a.) The dissent also stated that there were methods for reducing the risk of psychological trauma known to be caused by an abrupt severance of relationships. (App. 148a & n.4.)

On June 16, 1994, when Richard was more than three years old, the Illinois Supreme Court reversed the adoption, holding that in determining parental rights the best interests of the child could not be considered (App. 89a), and that the finding of the trial court was not supported by the evidence because the mother had blocked Kirchner's attempts to locate the child. The court ruled that "[u]nder the circumstances, the father had no opportunity to discharge any familial duty." (App. 89a.) The court also stated that when the father entered his appearance in the adoption proceedings (when Kirchner had not yet asserted, much less proved, his paternity), the Does "should have relinquished [Richard] at that time." (App. 89-90a; *but see* App. 42a.) The concurring opinion of Justice McMorrow specifically noted that the court did not address the standard that would apply in a custody hearing following the adoption decision. (App. 97a.)

In opposing the Does and Richard's petitions for certiorari to this Court from this first Illinois Supreme Court decision, Kirchner argued that:

> No aspect of [the Illinois Supreme Court's] ruling addressed the question of whether a custody hearing should occur in the wake of its decision, and the issue of Richard's custody has never been presented to the Illinois courts. To be sure, the issue of Richard's custody may yet

> be raised in subsequent litigation, presumably upon the filing by the Does of a petition for a custody hearing . . . .

(*Doe v. Kirchner*, No. 94-236, Br. of Resp't in Opp'n to Cert., Sept. 8, 1994, at 12.) This Court denied certiorari. *Baby Richard v. Kirchner* and *Doe v. Kirchner*, 115 S. Ct. 499 (1994).

Proceedings After the Illinois Supreme Court's First Ruling

Following this Court's denial of certiorari, the Does and Richard's guardian *ad litem* filed petitions for a determination of custody. The circuit court was proceeding toward a custody hearing. To preclude the hearing, Kirchner initiated an original habeas corpus proceeding in the Illinois Supreme Court. He contended that because he had established his biological relationship and because his parental rights had not been terminated, custody automatically transferred to him and therefore neither the Does nor Richard could lawfully be granted standing to be heard in any court. In their briefs responding to Kirchner's petition for habeas corpus, the Does and Richard argued, among other issues, that if their interests, needs, and the consequences of a change of Richard's custody were not considered in determining the issue of custody, their federal due process rights would be violated. (Does' Br. in Opp'n to Pet. for Habeas Corpus at 50-54; Br. and Argument of Baby Boy Richard at 18-22.)

On January 25, 1995, the Illinois Supreme Court heard oral argument on the habeas corpus petition. Two hours later, the court granted the petition, and issued its mandate, "[o]pinion and/or dissent(s) to follow." (App. 81a.) The writ directed to the Does read: "You are hereby ordered and directed to surrender forthwith custody of the child known as Baby Boy Richard, also known as Baby Boy Janikova, to Petitioner Otakar Kirchner." (App. 84-85a.)

Justice Stevens denied petitioners' application to stay the execution of the writ on January 28, 1995, *O'Connell v. Kirchner*, 115 S. Ct. 891 (1995), and the full Court denied the renewed

application on February 13, 1995, *O'Connell v. Kirchner*, 115 S. Ct. 1084 (1995). Justices O'Connor and Breyer dissented.

After the stay applications were denied, on February 28, 1995, the Illinois Supreme Court issued its opinion. Because this was an original proceeding in the Illinois Supreme Court, the court had no factual record concerning the conduct of the Does before or after their adoption of Richard, concerning Richard's four-year relationship with the Does and their biological son, or concerning Kirchner's ability to care for Richard. There was no factual hearing on the consequences to Richard or to the Does of removing him abruptly from the people he believes to be his parents and brother, of denying him psychiatric counseling before a move, or of permitting him to be denied any future contact with the Does. Thus, in describing the purported facts of this case, the Supreme Court of Illinois relied on the prior adoption proceeding. However, the sole issue before that court was whether Kirchner had taken sufficient action within the first 30 days following Richard's birth to assert his rights to Richard. No other issue was litigated, and the Does did not testify in that proceeding. (App. 34-35a.)

The Illinois Supreme Court rejected Richard and the Does' claim that Illinois law established that a decision as to Richard's custody had to be made after an evidentiary hearing and could not turn exclusively on the validity of the adoption. The Illinois Supreme Court held that the provision of such a hearing would violate Kirchner's constitutional rights under the Federal Constitution. Accordingly, the Illinois Supreme Court overruled its prior decision in *Giacopelli v. Florence Crittenton Home*, 158 N.E.2d 613 (Ill. 1959), which had held that after an evidentiary hearing, a parent could be denied custody if it were in the child's best interests. (App. 10-15a & n.1.)[2/] The court also rejected the

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[2/] The Illinois Supreme Court also held that a recent amendment to the Illinois Adoption Act, 1994 Ill. Legis. Serv. P.A. 88-550 (H.B. 2424) (West) (effective (continued...)

Does and Richard's federal claims that due process under the United States Constitution required that they be provided an evidentiary hearing before their family, created and nurtured by a state-sanctioned order of adoption, could be divided. (App. 28-30a.) As a result of the Illinois Supreme Court ruling, custody will also be granted to Daniela Janikova who waived all parental rights to Richard. (*See* App. 38a.)

According to the Illinois Supreme Court: "The superior rights of the natural parents to the care, custody and control of their child is the *law of the land* and is also embodied in Illinois statutory law. Unless a parent consents or is adjudged unfit, a child may not be placed in the custody of a nonparent." (App. 19a, citations omitted, emphasis added.) The court held that the established familial relationship between the Does and Richard does not create any liberty interest. (App. 28a.)

Two Justices dissented. Justices Miller and McMorrow specifically disagreed with the majority's construction of federal constitutional law. (App. 36-37a, 77-78a.) Justice McMorrow also cited serious distortions of the limited factual record, and the absence of any hearing on issues the majority held were critical, and wrote:

> In defiance of established Illinois law and the constitutional rights of a small child under this law, the majority has given Kirchner the power to summarily terminate the only family relationship that Richard has ever known. By its denial of the rights established in the Federal and State constitutions . . . the court has permitted a biological father who has never seen the four-year-old child the

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[2] (...continued)
July 3, 1994), which specifically provides a hearing to adoptive parents and the child to determine the proper custodial arrangements following a vacated adoption, could not apply to this case without violating the Illinois Constitution's separation of powers provision. (App. 23-28a.)

> unqualified right to remove the child from his home and family, without any court determination or oversight of the best interests of the child. I cannot countenance such a result, or concur in a decision which recognizes only the rights of the biological parent and which totally ignores the rights of the child and the Does, who cared for him since he was four days old.

(App. 79a.)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a conflict among the states as to the constitutional rights to due process of the biological parents, adoptive parents, and adopted child when a biological parent succeeds in overturning the adoption decree after relationships have been formed and a child has lived in the adoptive home for years. Faced with what has become a common tragedy in a modern society where children are too often born out of wedlock, the Illinois Supreme Court took the most extreme possible position. It treated an unwed biological father's interest as a property right, the child as a chattel, and the adoptive family as having no interests whatever. It held that, absent a finding of parental unfitness, the Due Process Clause of the Fourteenth Amendment *requires* an immediate transfer of custody of the child to his unwed biological father whom he has never met, and the forced abandonment of the only family the child knows. The Illinois court held that as a matter of federal constitutional law, it would be impermissible to provide any process whatever to weigh the particularized interests of the child and the adoptive parents. For the compelling reasons set forth below, the Court should grant review to determine whether the Illinois Supreme Court's constitutional analysis is correct.

First, in direct conflict with the Illinois ruling here, the Colorado Supreme Court has flatly held that the constitutional rights of a biological parent do *not* require the state to deny the child or

the psychological parents an opportunity to be heard in a custody hearing. *In re Custody of C.C.R.S.*, 1995 WL 33091, at *8, 10 (Colo. Jan. 30, 1995). Under the Illinois Supreme Court's analysis, states that permit their courts to consider the interests of the child and adoptive parents violate the constitutional rights of biological parents every time they conduct a custody hearing after an adoption is vacated. Other state supreme courts are similarly divided. (*See* pp.18-19, below.)

This conflict and the resulting widespread uncertainty need to be resolved now.[3/] Precisely because the law is unsettled in this area, wrenching cases like this one continue to arise. *See O'Connell v. Kirchner*, 115 S. Ct. 1084 (O'Connor, J., dissenting from denial of application for stay). Prolonged and damaging litigation is creating a kind of recurring national nightmare. The rights of children and of both the biological and adoptive parents need to be settled fairly and as early as possible. This cannot happen until this Court determines whether and how the Due Process Clause applies to these disputes.

More broadly, the Illinois Supreme Court's decision casts into doubt the constitutional validity of numerous provisions of the new Uniform Adoption Act, which is currently under consideration in state legislatures. The Uniform Act would provide for a custody hearing following most vacated adoptions and provides that all of the affected parties may be heard on the issue of custody. (*See* pp. 15-16, below.) In addition, the ruling in this case deters adoptions and undermines the physical and emotional security of adopted children and their adoptive parents around the country. They cannot be sure that an unknown biological father will not appear on the scene, claiming that his rights were improperly terminated and

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[3/] When this Court denied the stay in this case, the Illinois court had not issued its opinion. Therefore, it was not then apparent that the court would create this direct conflict.

relying on the Illinois court's decision to assert an automatic right to immediate and exclusive custody of a child he does not know.

Finally, the Illinois Supreme Court seriously erred on the merits in failing to weigh the competing constitutional claims of the unwed biological father, Richard, and the people who were legally his father, mother, and brother for more than three years of his life. The State of Illinois created this family by granting the Does' adoption petition. The adoption order directed the Does to treat Richard for all legal purposes as "the same as if born to them of their marriage." (App. 152a.) Richard and his adoptive parents and brother forged their interdependent relationship on the basis of that order. Their attachments and needs for one another cannot be obliterated by state fiat. Abruptly removing Richard from the only home he has ever known will cause substantial, irreparable harm to him, to the Does, and to their seven-year-old biological son. However, the Illinois Supreme Court held that in making a custody determination, the State is not free to give any weight, substantive or procedural, to the harm that will be caused by rupturing this family, whose bonds were created and fostered by the State. That ruling is highly problematic.

A due process liberty or associational interest in retaining some continued relationship after an adoption has been overturned follows from this Court's decisions requiring due process before the State may interfere with intact families. Contrary to the Illinois court's holding, this Court has recognized that constitutional protection does not depend on the existence of a biological relationship. *See, e.g., Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 843 (1977) ("*Smith v. OFFER*") ("[B]iological relationships are not exclusive determination of the existence of a family."). Moreover, under general due process protections, a state may not arbitrarily restrain, punish or injure a citizen. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977); *Rochin v. California*, 342 U.S. 165, 209-10 (1952). The Constitution is

equally implicated where, as in this case, a State threatens to inflict severe psychological trauma by wresting a small child from the family the State itself created.

Here, the Illinois Supreme Court not only refused to require procedural protection, it went much further. It held that the Constitution of the United States does not permit the states to consider those interests. Thus, under the Illinois rule, once an adoption is vacated, the State must automatically award exclusive custody to the unwed biological father, and regardless of how damaging the impact on the adoptive family, the State must deny them any process whatever. That ruling is impossible to square with this Court's prior decisions analyzing the limited constitutional interests of unwed biological fathers who have no established relationship with their children. Moreover, it would require a revolution in the law of the states.

I. Because Of The Conflict Among The States And The Widespread Uncertainty About The Proper Application Of The Due Process Clause In Proceedings Following A Vacated Adoption, There Is A Compelling Need For Supreme Court Review.

The Illinois Supreme Court's holding that the Constitution prohibits states from providing any process to adoptive parents and the child after an adoption is vacated (App. 11-12a), which generated two dissenting opinions, is in direct conflict with rulings on the federal constitutional issues of several other state supreme courts.[4/] Its ruling also casts doubt on the constitutionality of the prevailing practice in many other states. This conflict must be addressed because it affects a legal dilemma that is presenting itself

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[4/] *See In re Custody of C.C.R.S.*, 1995 WL 33091, at *8, 10 (Colo. Jan. 30, 1995); *In re Baby Boy C.*, 630 A.2d 670, 679 (D.C. 1993), *cert. denied*, 115 S. Ct. 58 (1994); *In re Steve B.D.*, 730 P.2d 942, 945 (Idaho 1986); *Sorentino v. Family and Children's Soc'y of Elizabeth*, 378 A.2d 18, 21 (N.J. 1977), *aff'd*, 391 A.2d 497 (N.J. 1978); *Lemley v. Barr*, 343 S.E.2d 101, 109 (W. Va. 1986).

with increasing frequency across the country -- the dilemma created when a child is lawfully adopted, the child lives with an adoptive family for an extended period, and the adoption is ultimately overturned.

In a case like this one involving a "failed adoption," many states permit the adoptive parents to participate in a custody hearing to determine whether, or in what manner, custody should be transferred to the biological parent.[5/] At the custody hearings, the

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[5/] *See* Ariz. Rev. Stat. Ann. § 8-118 (1994) (where adoption petition is denied or withdrawn, court "shall order the removal of the child from the proposed adoptive home if the court finds that such removal is in the child's best interest"); Ind. Code § 31-3-1-8(e) (1994) ("If the court dismisses the [adoption] petition, the court shall determine the person who should have custody of the child."); *In re Adoption of Dzurovcak*, 600 N.E.2d 143, 148 (Ind. Ct. App. 1992) (following dismissal of adoption petition, court of appeals remanded, ordered an evidentiary hearing to determine permanent custody of the child, and specifically ordered that the prospective adoptive parents be parties to the custody proceeding); Iowa Code Ann. § 600.13(1), (3) (1994) (where adoption petition is dismissed or interlocutory adoption decree is vacated, court shall determine custody according to child's best interests, which may include custody in adoption petitioner); *Cooley v. St. Andre's Child Placing Agency*, 415 A.2d 1084, 1086 (Me. 1980) (evidentiary hearing held on prospective adoptive mother's habeas petition seeking custody of child); N.H. Rev. Stat. Ann. § 170-B:15(IV) (1993) (upon dismissal of adoption petition, court shall "determine the person to have custody of the minor, including the [adoption] petitioners if in the best interest of the minor"); Or. Rev. Stat. § 109.119 (1993) (any person who "has established emotional ties creating a child-parent relationship with a child" may petition for custody); *see also* n. 4, above; as noted above, Illinois also enacted such a statute in direct response to this case (n. 2, above; App. 23a-28a); however, the Illinois Supreme Court's ruling in this case implicitly invalidates the statute on federal constitutional grounds; *see also In re Stevens*, 652 A.2d 18, 30 (Del. 1995) ("Habeas corpus clearly is not a substitute for an examination into the propriety of a longstanding child custody arrangement under the supervision of an appropriate State agency."); *Nale v. Robertson*, 871 S.W.2d 674, 680 (Tenn. 1994) (in affirming reversal of adoption, supreme court remanded for "entry of an order whereby custody will be transferred to [biological father] over a period of time and in the manner that is determined to be the least disruptive to the child").

(continued...)

interests of all concerned -- including the child's interest in avoiding any potential harm resulting from a transfer of custody -- are fully considered. The possible outcomes range from an order transferring custody to the biological parent to an order retaining custody in the adoptive parents, but may include any number of arrangements for sharing custody, visitation, or for an orderly transition of custody, minimizing trauma to the child.

A procedure that includes the adoptive child and the adoptive and biological parents is also expressly mandated in the new Uniform Adoption Act recommended to the states by the National Conference of Commissioners on Uniform State Laws in 1994. That Act provides that if a petition for adoption is ultimately dismissed, the court should then turn to the issue of custody, affording process to all concerned, and weighing the impact on the child. Unif. Adoption Act §§ 2-408(f), 2-409(f), 3-506, 3-704. As the commentary on the Act explains:

> Most importantly, the Act does not treat a minor as an object that 'belongs' to a parent or would-be parent and has to be shifted back and forth in the event 'ownership' rights are changed or reinstated. The fact that a birth parent's status as a legal parent may be restored or recognized upon the setting aside of a consent or a

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[9] (...continued)

In custody cases addressing situations in which children have lived for extended periods with non-parents, many states permit non-parents to participate in a hearing to determine custody of a child. *See, e.g., Turner v. Pannick*, 540 P.2d 1051, 1052 (Alaska 1975); Haw. Rev. Stat. § 571-46(2) (1994) ("Custody may be awarded to persons other than the father or mother whenever the award serves the best interest of the child. Any person who had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall be entitled prima facie to an award of custody."); *Ross v. Hoffman*, 372 A.2d 582, 587 (Md. 1977); *In re B.W.D.*, 725 S.W.2d 138, 138-39 (Mo. Ct. App. 1987); *Mansukhani v. Pailing*, 318 N.W.2d 748, 752-53 (N.D. 1982); *Moore v. Moore*, 386 S.E.2d 456, 459 (S.C. 1989); *Kishpaugh v. Kishpaugh*, 745 P.2d 1248, 1250 (Utah 1987); *Bailes v. Sours*, 340 S.E.2d 824, 827 (Va. 1986).

> relinquishment is *not* tantamount to a determination that the minor must be placed in that parent's custody.

Commentary to Unif. Adoption Act § 2-408 (1994).[6]

The analysis reflected in the Uniform Adoption Act is by no means novel. Parental rights have never been synonymous with custodial rights. In 1824, Supreme Court Justice Joseph Story, sitting as a circuit judge in *United States v. Green*, 326 F. Cas. 30, 31-32 (C.C.D.R.I. 1824) recognized:

> As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education. When therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes.

The Illinois court not only refused to follow this practice but held that, regardless of the circumstances, it would be unconstitutional for a state to consider any alternative other than an automatic and immediate "return" of custody to a biological parent

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[6] The Uniform Act provides that if a consent to adoption is set aside, custody should be returned to a parent who previously had legal and physical custody "unless the court finds that return will be detrimental to the minor," § 2-408(e), and that a custody dispute involving a parent "who did not have physical custody of a minor when the minor was placed for adoption" shall be decided based on the "best interest" standard, § 2-408(f). If adoption is denied for reasons unrelated to setting aside prior consent, the "best interest" standard is always applied. Unif. Adoption Act § 3-704. The new Act was approved by the American Bar Association at its meeting held on February 14, 1995, following four years of work by the Commissioners.

without regard to consequence. Thus, it overruled its own prior decision in *Giacopelli v. Florence Crittenton Home*, 158 N.E.2d 613 (Ill. 1959), which would have required a best-interest hearing, stating that: the "holding of *Giacopelli* is clearly unconstitutional. Married parents cannot be deprived of the care, custody and control of their child without a prior showing of unfitness for the sole reason that doing so is thought to be in the child's best interests." (App. 11-12a.) In so ruling, the Illinois court ignored the fact that this case is not about removing Richard from Kirchner's custody, because Kirchner never had custody of Richard. This case is about removing Richard from an intact family created by state law, where he was placed with the consent of his biological mother.

Nevertheless, the Illinois court held that the constitutional principles that apply to removing a child from an intact family required an immediate award of custody to Kirchner. The Illinois court expressed the view that this Court's decisions "dealing with the rights of unwed fathers thus far suggest that fathers such as Otto, whose parental rights are not properly terminated and who, through deceit, are kept from assuming responsibility for and developing a relationship with their children, are entitled to the same due process rights as fathers who actually are given an opportunity and do develop this relationship." App. 16-17a; *see also* App. 19a ("The superior rights of the natural parents to the care, custody and control of their child is the law of the land and is also embodied in Illinois statutory law."); App. 28a (rejecting the argument that "Richard himself has a [due process] liberty interest in the familial relationship he has developed with the Does").[7/]

In essence, the court below said that it was irrelevant how a custody transfer would impact on Richard and the Does, because

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[7/] While the Illinois Supreme Court also referred to state law, its analysis of state law was expressly "driven" by its federal constitutional analysis. Review is therefore appropriate under *Arizona v. Evans*, 115 S. Ct. 1185, 1189 (1995), and *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

the *only* constitutionally significant interest at stake here is the right of Kirchner to be the sole custodian as well as the parent of a four-year-old child he has never met. Other state courts have agreed with the Illinois court's constitutional analysis. *See Davis v. Collinsworth*, 771 S.W.2d 329, 330 (Ky. 1989); *Uhing v. Uhing*, 488 N.W.2d 366, 371-72 (Neb. 1992); *Blackburn v. Blackburn*, 292 S.E.2d 821, 826 (Ga. 1982); *In re Marriage of Pierce*, 645 P.2d 1353, 1356 (Mont. 1982); *In re Williams*, 869 P.2d 661, 665-66 (Kan. 1994); *In re Infant L.*, 462 N.E.2d 1165, 1168-69 (N.Y. 1984); *In re Grover*, 681 P.2d 81, 83 (Okla. 1984). However, this Court has never suggested that an unwed biological father who seeks the opportunity to develop a parent-child relationship has an absolute right to immediate possession of the child, regardless of the harm.

Moreover, the Illinois court's conclusions conflict not only with a practice that prevails among many states (*see* n. 5, above) but also with the specific constitutional holdings of several state supreme courts. Thus, in *In re Custody of C.C.R.S.*, 1995 WL 33091 (Colo. Jan. 30, 1995), the Colorado Supreme Court flatly rejected the argument that "due process . . . require[s] a showing of parental unfitness prior to applying the best interest of the child standard to determine custody." *Id.* at *3. The Colorado court directed application of a "presumption that the biological parent has a first and prior right to custody." *Id.* at *8. This presumption, however, "may be rebutted by evidence establishing that the welfare of the child -- *i.e.*, the best interests of the child -- is better served by granting custody to a non-parent." *Id.*

Other courts have reached the same conclusion on this constitutional issue. For example, in *Sorentino v. Family & Children's Society of Elizabeth*, 378 A.2d 18, 21 (N.J. 1977), *aff'd*, 391 A.2d 497 (N.J. 1978), the Supreme Court of New Jersey held that the constitutional rights of biological parents to custody were "not absolute," and it had to consider the "'potentiality for serious psychological harm' resulting from a transfer of custody from the

intending adoptive parents to the natural parents in view of the substantial period of time that the child had been in the only real home she had known." *See also In re Baby Boy C.*, 630 A.2d 670, 679 (D.C. 1993), *cert. denied*, 115 S. Ct. 58 (1994) (upholding the constitutionality of a "best interests" standard when an unwed father challenges an adoption petition); *Lemley v. Barr*, 343 S.E.2d 101, 109 (W. Va. 1986) (holding that the constitutional rights of the child must be considered and remanding for a custody determination "keeping appropriately in mind [the biological mother's] legal rights and [the child's] right to be treated as a human being" following invalidation of an adoption by the biological mother); *Barstad v. Frazier*, 348 N.W.2d 479, 489 (Wis. 1984) (construing federal constitutional law, court stated it may be "appropriate to recognize a family unit which does not include the natural parent" and that in a custody dispute between a biological parent and a third party, "extended disruption of parental custody" may require that third party be awarded custody).

Indeed, this Court has itself stated that after an adoption is vacated, the inquiry on custody is not at an end. In *Rothstein v. Lutheran Social Services of Wisconsin & Upper Michigan*, 405 U.S. 1051 (1972), this Court reviewed a Wisconsin decision holding that as a matter of law, an unwed father had no custodial or parental rights. This Court vacated and remanded the case for further consideration in light of *Stanley v. Illinois*, 405 U.S. 645 (1972). However, this Court recognized that custodial rights could not be determined in a vacuum and instructed the court on remand to determine custody in light of the facts, including the length of time the child had lived with the adoptive parents. This Court instructed the court on remand to give ***"due consideration [to] the completion of the adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time."*** *Rothstein*, 405 U.S. at 1051 (emphasis added).

The direct conflicts among the states and with the prior rulings of this Court, and the overall uncertainty created by the Illinois

Supreme Court's extreme analysis of the applicable constitutional principles, call for review by this Court. In light of the states' current pressing need for guidance, this Court should not defer intervention. The states are now considering the new Uniform Adoption Act, which addresses specifically and carefully the very problem presented here. The Illinois Supreme Court's decision would suggest that the Act's applicable provisions are unconstitutional. The dissenting Justices, the drafters of the Uniform Act, and other state supreme courts disagree. If this Court denies review, it is likely to affect the willingness of the states to adopt the Act or to continue to afford rights to children and adoptive parents in this setting.

In addition, the Illinois decision leaves in its wake widespread uncertainty for adoptive parents and their children. In many instances, regardless of the provisions of state law, adoptive families now face the possibility that an unknown biological father may appear and assert an absolute constitutional right to custody of a child he has never seen. That possibility and uncertainty hangs over them and will disrupt their family life until and unless this Court clarifies the competing constitutional claims raised by biological parents, adoptive parents, and children in this context. This risk will also deter both private and public agencies from placing *any* child whose parentage is unknown or in doubt, effectively preventing the adoptions of thousands of the most needy, at-risk infants and children.

II. The Illinois Supreme Court's Constitutional Analysis Is Plainly Incorrect.

This case also warrants review because the Illinois Supreme Court's analysis on the merits is patently wrong. The unwed biological parent cannot be the only party with an interest of constitutional magnitude.

A. The Child and the Adoptive Parents Have Liberty Interests that Deserve Protection Under the Due Process Clause.

The basic premise of the Illinois Supreme Court's ruling was that Richard's unwed biological father who had never supported or known Richard was the *only* party with a constitutionally protected liberty interest in the custody of Richard. The court went so far as to hold that this interest *required* the State to transfer custody immediately, regardless of the potential impact on other parties. (App. 11-12a.) That was plainly incorrect. We do not doubt that a biological parent is one of the parties whose interests are protected under the Due Process Clause after a vacated adoption, but the other parties have interests that also warrant constitutional protection.

By ordering that Richard be removed from the Does and transferred to his biological father "forthwith," the Illinois Supreme Court guaranteed that both four-year-old Richard, his seven-year-old brother, and the Does would suffer irreparable psychological and emotional harm of enormous magnitude. The Illinois Supreme Court also guaranteed that those harms will be inflicted arbitrarily, and without any consideration of mitigating alternatives. These undeniable realities raise serious constitutional concerns.

At its irreducible minimum, the Fourteenth Amendment protects all persons, including children, against the arbitrary infliction of serious harm by the State. *See, e.g., Riggins v. Nevada*, 112 S. Ct. 1810, 1815 (1992); *Washington v. Harper*, 494 U.S. 210, 228 (1990); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982); *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977); *Rochin v. California*, 342 U.S. 165, 209-10 (1952). It is well established that this Fourteenth Amendment liberty interest encompasses avoiding arbitrary harm from state-mandated physical transfers from one residence to another. *Addington v. Texas*, 441 U.S. 418, 425 (1979) (involuntary commitment of child); *Vitek v. Jones*, 445 U.S. 480, 488 (1980).

These elemental due process principles cast serious doubt on the Illinois Supreme Court's conclusion that the shared familial bond of Richard and the Does can be summarily dissolved, particularly when, as in this case, the bonds were the product of state orders authorizing the initial adoption and later upholding its validity. Until those orders were vacated, they were binding. *In re Marriage of Macino*, 603 N.E.2d 105, 107 (Ill. App. Ct. 1992); *Evergreen Sav. & Loan Ass'n v. Barnard*, 382 N.E.2d 467, 471 (Ill. App. Ct. 1978); *see also Maness v. Meyers*, 419 U.S. 449, 459 (1975) ("'an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings'") (citation omitted). Having created and fostered these familial bonds -- indeed, having instructed the Does to treat Richard as though he were their biological child -- the State of Illinois exceeded the bounds of its legitimate power when it subsequently shattered those bonds without any consideration whatsoever of the effect of that decision on the child or his adoptive family.

The validity of the Illinois Supreme Court's ruling is even more doubtful because the liberty interests at stake here involve the most intimate of all human relationships, and the most vulnerable of all humans. As this Court has recognized:

> [F]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life . . . .

Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984). The relationship that grows out of shared experience, nurturing, and interdependence is "an intrinsic element of personal liberty." *Id.* at 620. Thus, "the *constitutional shelter* afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others." *Id.* at 619 (emphasis added).

Vulnerable children who suffer the loss of their psychological parents face great difficulties developing into responsible and productive adults. They may be permanently scarred by being deprived of their loved ones. Indeed, research on bereavement has shown that children who lose even one parent experience behavioral problems as well as significant sadness, depression and anxiety. E. Kranzler, D. Shaffer, G. Wasserman & M. Davies, *Early Childhood Bereavement*, J. Am. Acad. Child Adolesc. Psychiatry 513, 518 (July 1990). Three and four-year-old boys are most susceptible. *Id.*; *see also Smith v. OFFER*, 431 U.S. 816, 844 n.52 (1977); J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* 18 (1979); J. Goldstein, A. Freud & A. Solnit, *Before the Best Interests of the Child* 40 (1973).

In light of the potential permanent damage, "the whole community" possesses an interest "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens." *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). Indeed, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens . . . ." *Id.* at 168.[8/]

It is established that these interests receive constitutional protection when they arise in the context of a traditional intact biological family. *See Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Indeed, this Court has long recognized that maintaining family relationships is

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[8/] The government has no countervailing interest in denying process before ordering a change in the custody of a child whose adoption has been vacated. Indeed, the State has a strong interest in the implementation of a procedure to safeguard the liberty interests of both children and adoptive parents who are parties to vacated adoptions. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), this Court articulated the States' interest in this regard: "The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years." *Id.* at 433; *see also Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (state has urgent interest in welfare of children).

an interest of constitutional status even in non-traditional settings. *Prince*, 321 U.S. at 164-66 (1944) (aunt has liberty interest in custody of a nine-year-old girl); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (equivalent liberty interests of parents and guardians in raising their children); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality) (liberty interest of members of an extended family in shared residence). Furthermore, in *Smith v. OFFER*, this Court assumed that the adoptive relationship was constitutionally protected and "recognized as the legal equivalent of biological parenthood," precisely because "a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship." 431 U.S. at 844 & n.51; *see also Rothstein v. Lutheran Social Services of Wisconsin & Upper Michigan*, 405 U.S. 1051 (1972); *Spielman v. Hildebrand*, 873 F.2d 1377, 1384 (10th Cir. 1989) ("adoptive parents . . . like natural parents, have a protected liberty interest in their familial relationships with their children"); *Thelan v. Catholic Social Servs.*, 691 F. Supp. 1179, 1185 (E.D. Wis. 1988) (finding a limited liberty interest even for prospective adoptive parents).

Kirchner and the Illinois Supreme Court take the view that the constitutional rights of an unwed biological parent preempt consideration of all other interests, regardless of the circumstances. But law, logic and tradition are to the contrary. Indeed, until the ruling under review in this case, Illinois law also provided for a best-interest hearing to determine custody when the child had been living with other persons. *See Giacopelli v. Florence Crittenton Home*, 158 N.E.2d 613, 618 (Ill. 1959). Overruling *Giacopelli*, the Illinois Supreme Court held that in the absence of a finding that the unwed biological father was unfit, this Court's decisions *precluded* consideration of the child's or adoptive family's interest in a custody proceeding because of the biological father's controlling constitutional rights. (App. 10-12a & n.1.)

In fact, the Illinois Supreme Court has turned the "law of the land" on its head and misused this Court's rulings. Properly understood, the very cases of this Court on which the Illinois Supreme Court relied hold that a state may curtail the rights of a biological unwed father, particularly when the father has not exercised financial responsibility for the child or established any relationship with the child, when others have. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); *Quilloin v. Walcott*, 434 U.S. 246, 254-56 (1978); *see also Michael H. v. Gerald D.*, 491 U.S. 110, 129-30 (1989) (holding that biological father's substantive due process rights were not violated by state statute barring him from establishing any visitation or custodial rights to a child born to a woman married to another man).[9/]

Far from mandating the result below, these decisions reflect a shared human appreciation of the paramount importance of preserving intact families, regardless of biological ties. *Stanley v. Illinois*, the very decision that recognized that unwed biological fathers had a constitutional liberty interest, sought to *preserve* a

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[9/] As we have shown, the Colorado Supreme Court read these cases exactly this way in *In re Custody of C.C.R.S.*, 1995 WL 33091 (Colo. Jan. 30, 1995). *See* Point I, above. In interpreting *Lehr*, at least two state supreme courts have granted an adoption despite the unwed biological father's persistent attempts to gain custody. *In re Steve B.D.*, 730 P.2d 942, 945-46 (Idaho 1986) (construing *Lehr* to provide that the Constitution permits an unwed biological father to lose his opportunity to establish a relationship with the child "through no fault of the unwed father or perhaps due to the interference of some private third party," and holding in that case that the opportunity had passed "in light of an already well-established bond between baby and adoptive parents"); *In re Pima County Juvenile Severance Action No. S-114487*, 876 P.2d 1121, 1133, 1136 (Ariz. 1994) (biological father's due process rights not violated where he failed to "quickly, diligently, and persistently" grasp the opportunity to establish relationship with child; construing *Lehr*, court stated that "in the child's eyes, a valiant but failed attempt to create a relationship means little. Severing long-established bonds with others is equally harmful to the child, regardless of whether the father first attempted to create a relationship.").

well-established family relationship. 405 U.S. 645, 651, 658 (1972). *See* App. 77-78a.

Where the claims of the biological father have conflicted with the societal interest in maintaining a stable family relationship, this Court has repeatedly ruled that the biological father's claims must give way. In *Lehr v. Robertson*, the Court upheld a standard that resulted in a stepparent's adoption of a child he was raising, over the objections of the biological father, reasoning that:

> Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.

463 U.S. at 260 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)). In *Quilloin v. Walcott*, this Court affirmed a state court ruling permitting the adoption of an eleven-year-old boy by his stepfather over the biological father's objection. The Court noted that "the result of the adoption in this case is to give full recognition to a family unit already in existence," and distinguished the case from one in which a child would be placed "with a new set of parents with whom the child had never before lived." 434 U.S. at 255.

At a bare minimum, this Court's decisions make clear that the unwed biological father's constitutional interests do not preclude state custody policies designed to minimize the risks of harm caused by abrupt changes in custody following vacated adoptions. Furthermore, although the decisions do not expressly recognize the constitutionally protected status of the familial ties between an adopted child and his or her adoptive parents, these cases must be understood as recognizing the fundamental importance of associational interests created by bonds of care and need. The Court has consistently ruled that the interests in maintaining stable family relationships may be treated by the states as weightier than the constitutional interests of biological parents.

Review is warranted to correct the extreme position of the Illinois Supreme Court, which denies recognition to constitutional interests that plainly warrant protection and would preclude the states from providing due process in custody hearings to children and their adoptive families.

B. The State Must Provide Some Particularized Process In Which All Competing Interests Are Considered.

The Illinois Supreme Court held that providing any particularized process to Richard or the Does or weighing the facts would be inconsistent with Kirchner's rights as an unwed biological father. (App. 11-12a.)[10] This all or nothing view of the Due Process Clause is incorrect. When there are competing interests of constitutional magnitude, the states are free to consider and weigh them through a variety of mechanisms, but they are not free to weigh only some rights to the total exclusion of others. As the Court made clear in *Rothstein*, what is required is "due consideration for the completion of adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time." 405 U.S. at 1051; *see also Palmore v. Sidoti*, 472 So. 2d 843, 846-47 (Fla. Dist. Ct. App. 1985), *on remand from* 466 U.S. 429 (1984) (court must consider where child has lived during custody dispute between biological parents).

When the official action threatened is the removal of a child from his family, the private interests are substantial and the consequences grave. The liberty interests of biological parents whose rights have not been waived, adoptive parents, and the child

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[10] Another fact the Illinois Supreme Court held could not be considered was that its order also had the effect of requiring Richard to be placed not only in Kirchner's custody but in the custody of Daniela Janikova, Richard's biological mother, who everyone agrees deceived Kirchner, visited this catastrophe on Richard, and has no legal rights with regard to Richard. (*See* App. 38a.) Moreover, Richard may thus be denied any legal mother.

are all implicated by such an order. *See Santosky v. Kramer*, 455 U.S. 745, 759 (1982) (suggesting that both the child and the parents with whom child has established a relationship have interest in where child is placed); *Smith v. OFFER*, 431 U.S. at 851 (interest requiring protection is that of family from whose home child may be transferred); *In re Gault*, 387 U.S. 1, 30-31 (1967) (child's fundamental liberty interest in avoiding punishment or confinement in juvenile facility requires due process); *Vitek v. Jones*, 445 U.S. 480, 490 (1980) (fundamental liberty interest in avoiding involuntary transfer from prison to mental hospital requires due process).

It is a principle basic to our society that before the State can deprive individuals of their most dearly held liberties and associations, such as home and family, the State must afford an opportunity to be heard. The proposed State enforcement of the change in Richard's custody triggered Richard and the Does' "right to be heard before being condemned to suffer grievous loss . . . ." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

The process required is one that is "appropriate to the nature of the case." *Smith v. OFFER*, 431 U.S. at 848 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). At a minimum, "due process" in this context should mean a fact-finding process that will develop the information on the specific family relationships and needs, as well as the relationships to and needs of the biological parents, and produce a rational accommodation of the interests of the parties to the vacated adoption and the biological parent.

The Illinois Supreme Court's requirement that particularized process be denied will result in arbitrary and unnecessarily cruel damage in transferring custody. *See Washington v. Harper*, 494

U.S. 210, 228 (1990) (due process requires that decision to interfere with liberty interest must be made in manner that is not arbitrary). Therefore, procedural safeguards are mandated. *Santosky*, 455 U.S. at 764 ("Given the weight of the private interests at stake, the social cost of even occasional error is sizable.").

A hearing need not, as Kirchner and the Illinois Supreme Court presuppose, result in exclusive custody and contact for one set of parents. A hearing may result in an award of joint custody, or an award of custody to one set of parents with visitation rights for the other set of parents. Even if a transfer of custody were found to be appropriate in a particular case, the hearing would nonetheless provide information needed to mitigate the trauma of a hasty and uncounseled transfer. *See* Goldstein et al., *Beyond the Best Interests of the Child*, *supra*, at 53-64; *see also Nale v. Robertson*, 871 S.W.2d 674, 680 (Tenn. 1994) (affirming reversal of trial court's grant of adoption and awarding custody to biological father, but remanding for "entry of an order whereby custody will be transferred to [biological father] over a period of time and in the manner that is determined to be the least disruptive to the child," who was then over three years old).

States should retain considerable discretion to determine the methodology used and standards applied to accommodate the competing interests involved in determining whether a transfer of custody is appropriate, how it should be accomplished, and what contacts should be maintained by both sets of parents. However, the Illinois Supreme Court's total preclusion of any hearing in which the adoptive parents and child may be heard cannot meet this standard. The Constitution requires a process that considers the constitutional interests of the child Richard and his adoptive parents, and that takes reasonable steps to minimize the risk that irreparable emotional and psychological harm will otherwise be arbitrarily inflicted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 5, 1995

APPENDIX

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1995 WL 80012

In re PETITION OF OTAKAR KIRCHNER, Natural Father, for a Writ of Habeas Corpus Ordering John and Jane Doe, Custodians of His Son, Richard, to Deliver Richard to Him

Otakar Kirchner, Petitioner; John and Jane Doe et al., Respondents.

No. 78101.

Supreme Court of Illinois.

Feb. 28, 1995.

PER CURIAM

*1 Otakar Kirchner was granted leave to file with this court a complaint for writ of habeas corpus on behalf of his son on November 15, 1994. The petition was premised upon this court's June 16, 1994, opinion invalidating the Does' adoption of Kirchner's son, herein identified as Richard. (*In re Petition of Doe* (1994), 159 Ill.2d 347.) The petition requested that this court order the Does to surrender custody of Richard to Kirchner.

Oral arguments on the propriety of the writ and the Does' standing to seek a separate custody hearing were held on January 25, 1995. On that same day following oral arguments, this court concluded that, under the circumstances of this case, the Does did not have standing under the law to request a custody hearing in the trial court. Consequently, we ordered the writ of *habeas corpus* to issue immediately in order to bring this protracted litigation to an end and to prevent any further delay in the process of uniting father and son. Our opinion follows.

HISTORY OF THE CASE

Otakar Kirchner (Otto) and Daniella Janikova, both Czechoslovakian immigrants, started dating in September of 1989 and began living together later that year. Seven months later, Daniella became pregnant. She and Otto continued living together and planned to get married. They obtained two marriage licenses towards this end, though they did not marry prior to the birth of their child, now commonly known as "Baby Richard." Shortly before Richard's birth, Otto returned to his native Czechoslovakia for two weeks to visit a dying relative. While he was away, a relative from Czechoslovakia telephoned Daniella and told her that Otto had resumed a relationship there with a former girlfriend. Distraught upon hearing this report, Daniella tore up their current marriage license, gathered her belongings and moved into a women's shelter because she had nowhere else to go.

While living at the shelter, and before Otto returned from his trip abroad, Daniella's instructor at the beauty school she was attending encouraged her to put the baby up for adoption. This instructor phoned her lawyer, Ed Shapiro, who informed his employee, Mrs. Doe, that there was a baby available for adoption. The next day, the Does contacted Daniella about the adoption. The day after that, the Does had an attorney named Tom Panichi call Daniella and commence the adoption proceedings. Through Panichi, the private adoption of not-yet-born Richard was arranged between Daniella and the Does.

At all relevant times, both the Does' lawyer and the Does were fully aware that Daniella knew who the father was and that she intended to tell the father that the child had died at birth. Indeed, according to the testimony of the Does' lawyer, Panichi, Daniella told him that Otto would not consent to the adoption and asked him whether he knew how to fake a death certificate, to which he responded that he did not know how this could be done and that he could not be a party to obtaining a fake death certificate.

*2 Rather than insist that Daniella disclose the name of the father so that he could be properly notified and his consent to the adoption procured, the Does and their attorney acquiesced in Daniella's scheme to tell Otto that his child had died at birth, even arranging for Daniella to give birth in a different hospital than she and Otto had originally planned. Indeed, attorney Panichi testified that he and the Does believed that "she was going to be able to control [Otto] from coming forward by still secreting the birth and the whereabouts [of the birth]."

Moreover, in his "Affidavit For Service By Publication," Panichi falsely stated that the father "upon due inquiry cannot be found so that process cannot be served upon defendant." The Does continued this subterfuge in their adoption petition filed with the circuit court, which falsely alleged under oath that the father was "unknown." Curiously, the record is devoid of any effort by the Does' lawyer to contact Daniella's beauty school instructor or any of Daniella's friends or relatives in an attempt to obtain Otto's identity. Nor was any attempt made to learn Otto's name by checking out the address that Daniella and Otto had shared for over a year prior to Richard's birth and where Otto still lived. In short, no reasonable inquiry was made.

Unsuspecting, Otto returned to Chicago prior to Daniella's due date, whereupon he discovered that Daniella had left him. He learned through friends that she lad gone to a women's shelter. He and Daniella then went through a period of reconciliation, during which time she did not inform him that she had arranged to place their child for adoption. When the birth took place on March 16, 1991, Otto's efforts to contact Daniella were rebuffed. He was told by Daniella's friends and relatives that his child had died at birth. We note that Otto and Daniella married in September of 1991.

In the weeks immediately following the birth, Otto, suspicious of the story that his child had died, attempted to discover the truth. In considering Otto's activities in the first 30 days after Richard's birth, the trial court found that Otto had called and visited the

hospital in which he and Daniella had planned to have their baby, as well as other hospitals, but could not locate any record of his child being born. The trial court also found that Otto had rooted through the garbage cans outside Daniella's uncle's house where she was staying in an attempt to discover whether there were any diapers or other physical evidence which would indicate that his baby was alive.

On May 12, 1991, or 57 days after the birth of Richard, Daniella confessed to Otto that she had given birth to a baby boy and had placed him in an adoptive home. At this juncture, Otto commenced his efforts to gain custody of his son. He retained a lawyer to help him. On June 6, 1991, Otto's lawyer entered an appearance on Otto's behalf in the subject adoption proceeding.

We note that at this point the adoption proceedings were rendered wholly defective. On June 6, 1991, the Does had both a legal and moral duty to surrender Richard to the custody of his father. Richard was then less than three months of age. Instead, the Does selfishly clung to the custody of Richard. They have prolonged these painful proceedings to the child's fourth birthday and have denied Otto any access to his own son.

*3 After protracted procedural posturing on the part of the Does, a hearing was finally had on Otto's petition to defeat the adoption wherein it was established that neither had he been notified nor had he consented to the adoption as required under the Adoption Act. The Does subsequently petitioned the court to find that Otto's parental rights should be terminated because he was unfit, thus obviating the need for his consent.

After a hearing, the trial court found that Otto was unfit pursuant to section 1(D)(1) of the Adoption Act, which provides that an unwed father is unfit where it is found by clear and convincing evidence that he has "fail[ed] to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth." (750

ILCS 50/1(D)(1), 8(a)(1) (West 1992).) Though the trial court found that Otto, in an attempt to learn the truth about Richard, called various hospitals and had sorted through Daniella's garbage cans in his search for evidence, all in the first 30 days after Richard's birth, the trial court did not deem this sufficient to show interest under section 8(a)(1). Rather, the court concluded, in essence, that Otto's efforts were insufficient because he did not contact a lawyer in that 30-day period. It was on this untenable basis that the trial court ruled that Otto was unfit.

Otto filed a notice of appeal. Fifteen months later, the appellate court, per Justice Rizzi, affirmed the trial court in a divided opinion (*In re Petition of Doe* (1993), 254 Ill.App.3d 405 (Tully, P.J., dissenting)). By the time the appellate opinion was filed, Richard was 2 1/2 years of age.

In erroneously affirming the trial court, the appellate court's majority opinion concentrated its discussion on the best-interests-of-the-child standard, addressing only secondarily the sole issue on appeal, namely, whether the trial court's ruling that Otto was unfit was against the manifest weight of the evidence. Having lost at the appellate level, Otto then appealed to this court, which, in a unanimous decision on June 16, 1994, reversed the trial and appellate courts and vacated the adoption, holding that Otto was fit under section 8(a)(1) of the Adoption Act and, thus, that his parental rights had never been properly terminated. *In re Petition of Doe*, 159 Ill.2d 347.

In vacating the adoption, this court noted that a child is not available for adoption until it has been validly determined that the rights of his parents have been properly terminated. As this court held in *In re Adoption of Syck* (1990), 138 Ill.2d 255, 276-78, when ruling on parental unfitness, a court cannot consider the child's best interests, since the child's welfare is not relevant in judging the fitness of the natural parent. Only after the parent has been found by clear and convincing evidence to be unfit can the court proceed to consider the child's best interests and whether those interests

would be served if the child were adopted by the petitioners. Though we note that the best-interests-of-the-child standard is not to be denigrated, we reiterate that this standard is never triggered until after it has been validly determined that a child is available for adoption.

*4 Under Illinois law, parents may be divested of parental rights either through their voluntary consent or involuntarily due to a finding of abuse, abandonment, neglect or unfitness by clear and convincing evidence. (*See* 750 ILCS 50/8, 11 (West 1992).) The adoption laws of Illinois are neither complex nor difficult of application. These laws intentionally place the burden of proof on the adoptive parents. In addition, Illinois law requires a good-faith effort to notify the natural father of the adoption proceedings. (750 ILCS 50/7 (West 1992).) We call this due process of law. In the case at hand, the Does and their lawyer knew that a real father existed whose name the birth mother knew. They also knew that the father, if contacted, would not consent to the adoption. This may explain their lack of effort to learn the name of the father and to give him notice. Under these circumstances, the Does proceeded with Richard's adoption at their peril.

This court then observed that Otto, as the natural father of Richard, was statutorily entitled to receive notice of the adoption and statutorily required to consent in order for the adoption to be valid, absent a finding of unfitness. Examining the unfitness finding of the trial court, we concluded that the trial court's finding was against the manifest weight of the evidence. As the trial court found, Otto searched the garbage cans of the home where Daniella was living for physical evidence of his baby and called a series of hospitals in an attempt to discover whether his child had really died at birth, during the first 30 days after Richard was born notwithstanding that he had been told his child was dead. Through lies, deceit and subterfuge, Otto was denied any opportunity to establish any involvement with his child during the first 57 days of his life. His activities, however, showed an intense interest and concern for

both the truth and for his child. He did what he could. Thus, the trial court's ruling that Otto had failed to show a sufficient interest in his child within the first 30 days after the child's birth was against the manifest weight of the evidence.

After this court's unanimous vacation of the adoption and our denial of the Does' petition for rehearing, we stayed the mandate at the Does' request pending their application for a writ of *certiorari* to the United States Supreme Court. The mandate of this court vacating the adoption issued on November 9, 1994, after the United States Supreme Court's denial of *certiorari* on November 7, 1994.

The Does, however, did not return Richard to Otto upon the issuance of this court's mandate. Subsequent to this court's opinion vacating the adoption, the General Assembly enacted an amendment to the Adoption Act which specified that it was to take effect immediately and apply to all cases pending at the time of the effective date, which was July 3, 1994. This new legislation, enacted at the urging of Governor Edgar, requires that upon the vacation of an adoption proceeding a custody hearing take place in order to determine who should have custody of the child based upon the child's best interests.

*5 Armed with this new amendment to the Adoption Act, as well as their interpretation of section 601(b)(2) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/601(b)(2) (West 1992)), the Does then petitioned for a custody hearing in the circuit court of Cook County. Richard's guardian *ad litem* joined that suit on Richard's behalf.

At this juncture, Otto filed the instant petition for writ of *habeas corpus* with our court, in essence arguing that upon the vacatur of Richard's adoption, he was legally vested with Richard's custody and that the Does and Richard's guardian *ad litem* were without standing to seek custody under either the Marriage and Dissolution of Marriage Act or the amendments to the Adoption Act. Insofar as Otto challenged the constitutionality of the Adoption

Act, the Illinois Attorney General requested and was granted leave to intervene in support of the constitutionality of the amendment.

Oral arguments on the propriety of the writ of *habeas corpus* were held on January 25, 1995. On the same day and following oral arguments, this court concluded that the Does did not legally have standing to request a custody hearing. Consequently, we ordered the writ of *habeas corpus* to issue immediately, with the opinion to follow, in order to bring this protracted litigation to a speedy and final conclusion.

JURISDICTION TO ENTERTAIN THE HABEAS CORPUS PETITION

Initially, it must be determined whether Otto has standing to act on behalf of his son to file the instant *habeas corpus* petition. Contrary to the suggestion of the public guardian, the court-ordered appointment of a guardian *ad litem* does not divest Otto of his right to act on his son's behalf in filing a *habeas* petition. (*See People ex rel. Edwards v. Livingston* (1969), 42 Ill.2d 201; *Cormack v. Marshall* (1904), 211 Ill. 519.) Indeed, insofar as this court held in its June 16, 1994, opinion that Otto expressed sufficient interest in his son such that his parental rights had not legally been terminated, no one, not even Richard's guardian *ad litem*, stands in a better position than Otto to represent the interests of his son.

It must likewise be decided whether a writ of *habeas corpus* is appropriate in cases where the would-be adoptive parents attempt to retain custody of a child notwithstanding the invalidation of the adoption by the courts. This court has jurisdiction to entertain writs of *habeas corpus*, generally, pursuant to article VI, section 4(a), of the Illinois Constitution of 1970 (Ill. Const.1970, art. VI, s 4(a)), as well as Supreme Court Rule 381(a) (134 Ill.2d R. 381(a)). Moreover, historically, the writ was employed in instances where the custody of a child was at issue and the petitioner had no other legal avenue by which to seek custody of the child. *See Edwards*, 42 Ill.2d 201; *Cormack*, 211 Ill. 519.

The Does argue that Otto should not be allowed to seek the writ because the vacation of the adoption does not require that custody revert to Otto and, further, that section 601(b) of the Marriage and Dissolution of Marriage Act, as well as the amendments to the Adoption Act (Pub. Act 88-550, eff. July 3, 1994 (adding 750 ILCS 50/20(b))) which became effective while the Does' petition for rehearing was pending in this court, take precedence over these proceedings. We disagree. For the reasons expressed later in this opinion, we find that neither the Marriage and Dissolution of Marriage Act nor the recent Adoption Act amendments apply to the instant case. As a consequence, Otto has properly filed the instant writ of *habeas corpus* which this court has jurisdiction to grant pursuant to article VI, section 4(a), of the Illinois Constitution of 1970, as well as Supreme Court Rule 381(a).

*6 The Does further argue, as does the public guardian, that Otto's *habeas* petition is improper because Richard is not being restrained in his liberty against his will. In support, they note that he is in the custody of the persons who have raised him since birth and, further, that his guardian *ad litem*, whose purpose is to safeguard Richard's interests, does not object to the Does' continued custody of Richard. However, the self-serving nature of this argument is readily apparent. As we have observed above, Otto, as Richard's natural father whose rights have not been terminated, has equal if not greater standing to assert what is in his son's best interests. To the extent that he disagrees with Richard's guardian *ad litem*, not to mention Richard's current custodians, Otto speaks for Richard and is entitled to file a writ of *habeas corpus* on Richard's behalf.

Finally, noting that under Supreme Court Rule 381(a) this court does not have jurisdiction to entertain *habeas* petitions where factual questions must be decided, the Does argue that this court does not have jurisdiction because granting the instant *habeas* petition requires us to weigh facts to determine where Richard's best interests lie in awarding custody. In support, the Does cite *Sullivan*

v. People ex rel. Heeney (1906), 224 Ill. 468, 477, for the proposition that upon the vacation of an adoption there must be a best- interests hearing to determine who should have custody of the improperly adopted child. The Does, however, grossly misread *Sullivan* on this point.

In *Sullivan*, this court vacated the adoption because the married father did not have notice of the adoption of his daughter. (*Sullivan*, 224 Ill. at 472.) However, because there was evidence that the father had abandoned his wife and child for six years prior to the adoption, the court remanded the case to the trial court to determine whether the father was unfit. (*Sullivan*, 224 Ill. at 477.) In so doing, the court noted that the best interests of the child might require that her father not be vested with her custody upon the vacation of the adoption. *Sullivan*, 224 Ill. at 477. In claiming that *Sullivan* likewise requires a best-interests hearing in the instant case, the Does take the best-interests language of *Sullivan* out of context. *Sullivan* explicitly stated that upon the vacation of an adoption, custody of the child cannot remain with the would-be adoptive parent absent a finding that the natural parent is unfit. (*Sullivan*, 224 Ill. at 476.) Though the *Sullivan* court spoke in terms of the best interests of the child and remanded the matter to the trial court for further proceedings, the proceeding ordered was not a best-interests hearing but, rather, a fitness hearing. Indeed, the *Sullivan* court emphatically stated that the child's father's rights were "superior to the right of any other person" in the event that he were subsequently adjudicated fit in the remanded proceedings. (*Sullivan*, 224 Ill. at 476-77.) Because we have already ruled that Otto was "fit" as defined by the Adoption Act, Otto's rights are similarly "superior to the right of any other person" and a best-interests hearing would thus be improper.

*7 The Does also cite *Giacopelli v. Florence Crittenton Home* (1959), 16 Ill.2d 556, for the proposition that Otto must participate in a best-interests hearing and, thus, that a father can be divested of his right to the care, custody and control of his child without a

finding of unfitness upon the vacation of an adoption where doing so is in the child's best interests. The *Giacopelli* mother and father were married and conceived a child when the mother was 44 years old. (*Giacopelli*, 16 Ill.2d at 558.) The mother travelled from Missouri, where she and her husband lived, to visit a relative in Illinois. (*Giacopelli*, 16 Ill.2d at 558.) While in Peoria, Illinois, she contacted the Florence Crittenton Home for unwed mothers and arranged to place the baby with an adoptive family. Upon the child's birth, the circuit court entered a finding of dependency and appointed a guardian, who subsequently placed the child with a family that intended to adopt the child. (*Giacopelli*, 16 Ill.2d at 560-61.) When the father found out about this several months later, he successfully had the finding of dependency vacated for lack of notice and then sought the return of his child. (*Giacopelli*, 16 Ill.2d at 562.) When the adoptive parents refused, the father filed a *habeas* petition seeking an order that his child be delivered to his care, custody and control.

Upon consideration of the advantages of the home in which the child had been placed, the trial court found that it would be in the child's best interests if she were not returned to her father. (*Giacopelli*, 16 Ill.2d at 563.) The appellate court reversed, noting that there had been no finding of unfitness and that a married father cannot be denied the care, custody and control of his child without first finding him unfit. (*Giacopelli*, 16 Ill.2d at 563.) This court, however, reversed the appellate court and held that a married father could be denied his rights to the care, custody and control of his child without a finding of unfitness if this is in the child's best interests.

Initially, we note that the holding of *Giacopelli* is clearly unconstitutional. Married parents cannot be deprived of the care, custody and control of their child without a prior showing of unfitness for the sole reason that doing so is thought to be in the child's best interests. (*Quilloin v. Walcott* (1978), 434 U.S. 246, 255, 54 L.Ed.2d 511, 520, 98 S.Ct. 549, 555, citing *Smith v.*

Organization of Foster Families for Equality & Reform (1977), 431 U.S. 816, 862-63, 53 L.Ed.2d 14, 46, 97 S.Ct. 2094, 2119 (Stewart, J., concurring in the judgment, joined by Burger, C.J., and Rehnquist, J.).) Rather, unfitness must first be found. (*Quilloin*, 434 U.S. 246, 54 L.Ed.2d 511, 98 S.Ct. 549.) Thus, because *Giacopelli* dispenses with the need to find unfitness, it stands as an unconstitutional remnant of a bygone era and has no precedential value. The Does' contention that *Giacopelli* somehow requires that Otto be subjected to a best-interests hearing without first being found unfit is therefore meritless.[1]

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[1] Parenthetically, we note that even if *Giacopelli* could survive constitutional scrutiny, it was improperly decided. Along with Sullivan, Giacopelli cites five cases in support of its holding that the best- interests-of-the-child standard controls the outcome of a custody hearing notwithstanding that the natural parents have not been found unfit. (*Stalder v. Stone* (1952), 412 Ill. 488; *People ex rel. Noonan v. Wingate* (1941), 376 Ill. 244; *Mahon v. People ex rel. Robertson* (1905), 218 Ill. 171; *Cormack v. Marshall* (1904), 211 Ill. 519; *In re Petition of Smith* (1851), 13 Ill. 139.) None of these cases, however, stand for this proposition. *Smith*, *Robertson* and *Wingate* involved custody disputes between nonparents. *Cormack*, 211 Ill. at 527, implicitly required an unfitness finding as a prerequisite to divesting a natural parent of custody where it states that the parental-preference doctrine controls absent "glaring defects and such disregard of morals." (See also *Cormack*, 211 Ill. at 523-24.) Finally, *Stalder* denied the natural mother custody of her child only upon the court's finding that she was unfit due to desertion and depravity, and only then stated that "under this evidence" the superior right of the parent must yield to the best interests of the child. (*Stalder*, 412 Ill. at 497-98.) Clearly, none of these cases support the *Giacopelli* court's assertion that a child can be taken away from a married father (or an unwed father for that matter) without a finding of unfitness. Recognizing that the Giacopelli majority's pronouncement departed from all precedent, Justice Klingbiel's concurrence, joined by Justices Schaefer and

Moreover, the reasoning in *Giacopelli* does not comport with this court's more recent pronouncements regarding custody law and the difference between custody proceedings and adoption proceedings. In *In re Custody of Townsend* (1981), 86 Ill.2d 502, 508-09, this court held:

> "The superior-right doctrine or presumption in favor of the natural parent, however, need not always be applied automatically in conjunction with the best- interests-of-the-child standard. For example, in a dissolution-of-marriage proceeding, the superior-right doctrine will not be applied where both the natural parents are seeking custody of their children. Instead each starts out on equal footing, with the court ultimately determining custody 'in accordance with the best interest of the child' [citation]. Under the Adoption Act [citation], on the other hand, both the superior-right doctrine [citation] and the best-interests standard are applied [citation], though in this setting, a court, before permitting adoption by a third party, may not terminate all parental rights, including custody, unless the

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House, made it clear that a finding of unfitness was a prerequisite to taking children away from their parents and that the bare assertion that doing so is in a child's best interests is insufficient to justify taking children away from their parents without a finding of unfitness. Turning to the majority opinion, the concurring Justices noted that beyond making the assertion that the best interests of the child control regardless of unfitness, the majority found in favor of the adoptive parents because the father was clearly unfit. (Giacopelli, 16 Ill.2d at 562, 566-67 (father had 26 arrests, numerous convictions, several convictions for bigamy, and a lack of interest in his wife and child prior to and after the birth of the child).) Only because the concurring Justices likewise found that the father was unfit did they concur in the judgment of the court, though not in its reasoning.

> parent or parents consent or are found to be 'unfit.'" (Emphasis added.)

From Townsend it follows that, to the extent *Giacopelli* allows the termination of parental rights in adoption proceedings without a finding of unfitness, it is not the law of Illinois. *See Robinson v. Neubauer* (1967), 79 Ill.App.3d 362, 366-67 (following the concurrence in *Giacopelli* and not the majority).

Although Townsend cites to *Giacopelli* and further finds that the father at issue need not be found unfit to award custody of his child to a third party, it does so pursuant to the Probate Act of 1975, which is only triggered upon the death of a parent, a situation we are not confronted with in the instant case. Unlike the Adoption Act, the Probate Act does not statutorily mandate a finding of unfitness as a condition precedent to divesting a parent of custody. (*See* 755 ILCS 5/11–7 (West 1992); *see also People ex rel. Edwards v. Livingston* (1969), 42 Ill.2d 201 (a probate case deciding custody based upon the best interests of the child without a prior finding of unfitness).) The best-interests standard employed pursuant to the Probate Act in Townsend and Edwards is thus inapplicable to the case at bar both because this case does not involve a deceased parent and because Otto's cause of action arises out of the Adoption Act, which mandates a finding of unfitness before parental rights may be terminated. Moreover, we note the extremely adverse public policy ramifications of holding that parents and their offspring can be deprived of the care, custody and control of the natural parent through the deceitful circumvention of the safeguards afforded natural parents in the Adoption Act: namely, the right to notice and the absolute right to veto the adoption absent a finding of unfitness.

The sole issue, then, in the instant *habeas* proceeding is the legal question of the Does' asserted standing to request a custody hearing under either section 601(b)(2) of the Marriage and Dissolution of Marriage Act (750 ILCS 5/601(b)(2) (West 1992)) or the amendment to the Adoption Act (Pub. Act 88-550, eff. July

3, 1994). Because we find, as a matter of law, that neither of these statutes apply in the instant case, there are no further factual issues to be determined. Thus, the issuance of the writ of *habeas corpus* by this court is a proper and just procedure.

STANDING UNDER SECTION 601(b)(2) OF THE ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT

*9 Our decision of June 16, 1994, unanimously held that Otto had exhibited sufficient interest in his child during the first 30 days of his life and that the trial court had thus erred in finding him unfit pursuant to section 8(a)(1) of the Adoption Act. Insofar as this court denied the petition for rehearing in this case on July 12, 1994, the doctrine of *res judicata* precludes reconsideration of these conclusions in determining the appropriate outcome in the instant *habeas corpus* proceeding. Rather, what must be determined is the effect of this court's vacation of the Does' invalid adoption of Richard.

The Does assert that they have standing under section 601(b)(2) of the Marriage and Dissolution of Marriage Act to seek a custody hearing to determine who should have custody of Otto's son now that the adoption has been vacated. We disagree.

Initially, the Does argue that Otto has waived the right to object to their lack of standing to request a hearing under section 601(b)(2) because of his failure to make a timely objection to their lack of standing. The Does point out that Otto never filed an affirmative defense of lack of standing in his response to the Does' section 601(b)(2) motion filed with the circuit court of Cook County on December 23, 1991, but, rather, raised it for the first time in the instant *habeas* proceedings, over three years later. This argument, however, is meritless. The Does' section 601(b)(2) petition of 1991 was filed together with their amended petition to adopt Richard. When the circuit court erroneously approved the adoption in May of 1992, thus terminating Otto's parental rights, the Does' section

601(b)(2) petition for a custody hearing was rendered a nullity insofar as they had been awarded custody of Richard under the Adoption Act. Indeed, the Does' filing of a second section 601(b)(2) petition in November of 1994 evidences that even they do not take seriously their contention that their 1991 petition is still pending.

Though our decision is based solely on Illinois law, in determining what role section 601(b)(2) of the Marriage and Dissolution of Marriage Act plays in the instant case we commence with a review of the rights afforded unwed fathers by our Federal Constitution. At stake here is the interest that a natural parent has in the care, custody and control of his or her child, an interest that has long been recognized and afforded constitutional protection. In a series of cases considering the rights of unwed fathers *vis-a-vis* their offspring, the United States Supreme Court has indicated that while biology alone is insufficient to vest an unwed father with the same rights as the child's mother, if the unwed father grasps the opportunity that this biological link provides, accepts responsibility for the child, and develops a relationship with the child, the father enjoys the same constitutional due process rights afforded married fathers and birth mothers. (*Michael H. v. Gerald D.* (1989), 491 U.S. 110, 105 L.Ed.2d 91, 109 S.Ct. 2333; *Lehr v. Robertson* (1983), 463 U.S. 248, 77 L.Ed.2d 614, 103 S.Ct. 2985; *Caban v. Mohammed* (1979), 441 U.S. 380, 60 L.Ed.2d 297, 99 S.Ct. 1760; *Quilloin v. Walcot* (1978), 434 U.S. 246, 54 L.Ed.2d 511, 98 S.Ct. 549; *Stanley v. Illinois* (1972), 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208.) Of course, where an unwed father fails to grasp this opportunity, the father is not vested with these due process rights.

***10** None of these United States Supreme Court decisions, however, discuss an unwed father's rights regarding an infant placed for adoption at birth who seeks to raise his child but is prevented from doing so through deception. We find that the rationale underlying the Court's opinions dealing with the rights of unwed fathers thus far suggests that fathers such as Otto, whose

parental rights are not properly terminated and who, through deceit, are kept from assuming responsibility for and developing a relationship with their children, are entitled to the same due process rights as fathers who actually are given an opportunity and do develop this relationship. To hold otherwise would be to encourage and reward deceit similar to that which occurred in the instant case.

Moreover, without regard to Federal constitutional jurisprudence, Illinois law requires that Otto be granted the care, custody and control of his son. The Adoption Act (750 ILCS 50/1 et seq. (West 1992)) creates a framework which acknowledges the due process rights of unwed fathers and balances their rights to the care, custody and control of their children with the need to facilitate orderly and final adoptions which are not subject to collateral attack. Toward this end, the Adoption Act provides that where the birth mother is not married to the father, his consent to the adoption is essential except where he has been found unfit by clear and convincing evidence. (750 ILCS 50/8(a)(1) (West 1992).) Among the statutory factors for finding unfitness, and the one asserted to be applicable to the instant case, is the provision finding unfitness where the father fails to "demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth." 750 ILCS 50/1(D)(1), 8(a)(1) (West 1992).

Under the Adoption Act effective at the time this court invalidated the Does' adoption of Richard, an unwed father who was both fit and willing to take on the responsibility of raising his child had a right superior to all others except the birth mother to the care, custody and control of his child. Moreover, such a fit and willing father had the absolute right to block the adoption of his child, notwithstanding the birth mother's desire to place the child with an adoptive family. (*See* 750 ILCS 50/8(a)(1) (West 1992) (requiring that "consents shall be required in all cases, unless the person whose consent would otherwise be required shall be found by the court, by clear and convincing evidence * * * to be an unfit

person as defined in Section 1 of this Act").) In this manner, the statute safeguards the rights of unwed fathers who come forward and are willing and fit to raise their children.

The Adoption Act does not explicitly address the rights of all the parties to a failed adoption. However, the procedural safeguards afforded fathers by the Adoption Act militate that fathers be placed in the same legal position after, the vacation of an invalid adoption as they were in prior to the invalid adoption's approval. As already discussed, the Adoption Act requires that an unwed father either consent to the adoption of his child or be found unfit by clear and convincing evidence before a valid adoption can take place.

*11 Now that the invalid adoption of Richard has been vacated, the Does seek to use the Marriage and Dissolution of Marriage Act to obtain a custody hearing. However, it follows from the Adoption Act that the Does cannot, once an invalid adoption is vacated, attempt to circumvent the rights afforded fathers under the Adoption Act by seeking a custody hearing under the Marriage and Dissolution of Marriage Act, which, unlike the Adoption Act, could result in a father's being divested of his right to the care, custody and control of his child without being found unfit by clear and convincing evidence.

This construction is wholly consistent with the purpose of the Adoption Act, which balances the age-old parental-preference doctrine that a child is better off being raised by his or her natural parent(s) with the need to facilitate legal adoptions. Thus, we hold that where an unwed father is fit and willing to develop a relationship with and raise his child, but is prevented from doing so through deceit and an invalid adoption proceeding, that father is entitled to the care, custody and control of his child upon the subsequent vacatur of the invalid adoption. Under these facts, we hold that a section 601(b)(2) hearing under the Marriage and Dissolution of Marriage Act would be improper because it would

contravene the safeguards afforded unwed fathers in the Adoption Act.

Moreover, we note that the Does' dependence on section 601(b)(2), even if it did not improperly attempt to circumvent the procedural safeguards of the Adoption Act, is otherwise misplaced. Our conclusion that the Does are not entitled to a section 601(b)(2) custody hearing depends not only upon our determination that the vacation of an adoption puts all the parties in the same position that they were in prior to the vacatur of the adoption, but also upon a thoughtful reading and analysis of section 601(b)(2) itself.

The superior rights of the natural parents to the care, custody and control of their child is the law of the land and is also embodied in Illinois statutory law. (*See In re Custody of Peterson* (1986), 112 Ill.2d 48, 51; *In re Custody of Menconi* (1983), 117 Ill.App.3d 394, 397-98; *In re Custody of Barokas* (1982), 109 Ill.App.3d 536, 543.) Unless a parent consents or is adjudged unfit, a child may not be placed in the custody of a nonparent. (*Peterson*, 112 Ill.2d 48.) Given that section 601(b)(2) of the Marriage and Dissolution of Marriage Act allows for custody to be vested in a nonparent without first finding unfitness, its application must be narrowly construed to ensure the sanctity of the family and the reciprocal familial rights of parents and their children. *Peterson*, 112 Ill.2d at 54.

Section 601 reads in pertinent part: "(b) A child custody proceeding is commenced in the court:

* * *

(2) by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents." (750 ILCS 5/601(b)(2) (West 1992).) ***12** At first glance, the terms of this provision might suggest that the Does have standing to seek a custody hearing regarding Richard because

Richard is not in the physical possession of Otto. This interpretation, however, is flawed.

Before a nonparent can demand a custody hearing to determine the best interests of a child under section 601(b)(2) of the Marriage and Dissolution of Marriage Act, the nonparent must first show that he or she has standing to invoke this extraordinary provision. (*Peterson*, 112 Ill.2d at 53.) It is this standing requirement that ensures that the superior right of natural parents to the care and custody of their children are safeguarded. A nonparent may only assert standing under section 601(b)(2) if the natural parent at issue does not have physical custody of his or her child.

But physical possession is not the same as physical custody, and it is the difference between these two concepts that defeats the Does standing argument under the section 601(b)(2). The determination that a parent does not have physical custody of a child turns not on possession; rather, it requires that that parent somehow has voluntarily and indefinitely relinquished custody of the child. (*See In re Custody of Kulawiak* (1993), 256 Ill.App.3d 956, 962; *In re Marriage of Sechrest* (1990), 202 Ill.App.3d 865, 873.) Whether the relinquishment results from a calculated decision on the parent's part or is the product of abandonment, the relinquishment must be voluntary for section 601(b)(2) to apply. *Sechrest*, 202 Ill.App.3d at 873.

In reading any statute, its words must be given a commonsense meaning. The Does would have us lift the word "custody" from this statute and conclude that it is synonymous with "possession." That cannot be. The father and natural guardian, Otto, neither voluntarily placed Richard with the Does nor has he consented to their continued possession. For purposes of section 601(b)(2), therefore, the Does do not have "custody." Rather, they have mere possession.

In simple terms, Richard is in the Does' home without color of right. The Does' sole claim to custody of Richard was

invalidated by this court on June 16, 1994, when their invalid adoption of Richard was vacated. Since that date, the Does have retained physical possession of Richard but not his custody for purposes of section 601(b)(2).

No one could legitimately suggest that the headmaster of a boarding school or the director of a children's summer camp would have "custody" under the Marriage and Dissolution of Marriage Act so as to give him standing to maintain a custody action against a parent. All he would have is physical possession. With even less authority can such standing be asserted by a nonparent who has physical possession of a child without any authority from the parent or claim of right whatsoever save the passage of time.

To hold otherwise would contravene the twin policies of the Marriage and Dissolution of Marriage Act, which favor the superior rights of parents to the care, custody and control of their children and the deterrence of abductions and other unilateral removals of children from their natural parents. (*In re Marriage of Carey* (1989), 188 Ill.App.3d 1040, 1048.) If standing under the Act is not predicated upon voluntary relinquishment, the abduction of a child could result in the abductors having standing under section 601(b)(2), a conclusion hardly intended by the legislature and not one this court can countenance. *Peterson*, 112 Ill.2d at 54.

***13** Moreover, while the birth mother in the instant case might properly be found to have voluntarily relinquished her right to the care and custody of Richard, her unilateral relinquishment cannot be imputed to Otto. A unilateral relinquishment by one parent cannot serve as the basis for establishing standing under section 601(b)(2) as against the other parent. (*See Sechrest*, 202 Ill.App.3d at 873.) Indeed, as the appellate court in *Sechrest* correctly noted, any other holding might encourage a vindictive parent to give custody of a child to a nonparent to prevent the other parent from obtaining or exercising custodial rights, the exact situation in the instant case. *Sechrest*, 202 Ill.App.3d at 873.

We acknowledge that the numerous appellate decisions considering standing under section 601(b)(2) have not always focused on voluntary relinquishment as the sole factor in determining whether the nonparents have standing. However, this is because voluntary relinquishment does not always vest standing in nonparents under the Act. Indeed, many courts engage in a fact-specific investigation to determine whether a nonparent has physical custody of a child in which not only the voluntary relinquishment of the child is considered, but also the intent of the parents when they handed over possession to third parties, the length of the transfer and the facts surrounding the relinquishment. *See In re Santa Cruz* (1988), 172 Ill.App.3d 775, 783-86 (discussion of factors considered in determining whether a nonparent has physical custody of another parent's child).

None of these cases, however, stand for the proposition that any combination of factors, absent voluntary relinquishment, could afford standing under section 601(b)(2). Indeed, an exhaustive review of every case where section 601(b)(2) standing was at issue discloses that this custody provision has never been invoked to alter parental rights absent some measure of voluntary relinquishment.

Thus, we find that section 601(b)(2) cannot be invoked as against Otto in the instant case because he has never voluntarily relinquished his right to the care, custody and control of his child. Indeed, quite to the contrary, Otto exhibited sincere and vigorous interest in his child--first to learn the truth of his son's existence and then, upon discovering that his son had been placed for adoption, to obtain his possession. Deceit and subterfuge on the part of the Does and their legal counsel to deny Otto knowledge of, access to, and custody of his son cannot form the foundation for standing under section 601(b)(2).

STANDING UNDER THE BABY RICHARD AMENDMENT

Less than three weeks after this court issued its June 16, 1994, decision reversing the trial and appellate courts' decisions in this case, the General Assembly held an emergency session during which it passed Public Act 8 & -560, which amended the Adoption Act (750 ILCS 50/1 et seq. (West 1992)). The amendment provides, inter alia:

> *14 "In the event a judgment order for adoption is vacated or a petition for adoption is denied, the court shall promptly conduct a hearing as to the temporary and permanent custody of the minor child who is the subject of the proceedings pursuant to Part VI of the Illinois Marriage and Dissolution of Marriage Act. The parties to said proceedings shall be the petitioners to the adoption proceedings, the minor child, any biological parents whose parental rights have not been terminated, and other parties who have been granted leave to intervene in the proceedings.
>
> * * *
>
> This amendatory Act of 1994 applies to cases pending on and after its effective date." (Emphasis added.) (Pub. Act. 88-550, eff. July 3, 1994 (adding 750 ILCS 50/20 (b)).)

The Does contend that this recent amendment to the Adoption Act, which gives adoptive parents standing to seek permanent custody of the child in a failed adoption, applies to the instant case. In support, they argue that the amendment became effective on July 3, 1994, prior to this court's denial of the Does' petition for rehearing and prior to the United States Supreme Court's denial of the Does' writ of *certiorari*. Because of these post-decision petitions, the Does conclude that the instant case was still pending after the effective date of the amendments and thus that the

legislation applies. Otto counters that because his rights had been finally adjudicated in this court's June 16, 1994, opinion, applying the amendment retroactively is unconstitutionally violative of the separation of powers doctrine.

The principle of separation of powers is embodied in article II, section 1, of the Illinois Constitution of 1970, which provides: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." (Ill. Const.1970, art. II, s 1.) This court has observed that the General Assembly is not a court of last resort and it may not attempt to retroactively apply new statutory language to annul a prior decision of this court. (*Roth v. Yackley* (1979), 77 Ill.2d 423.) While the General Assembly may enact retroactive legislation which changes the effect of a prior decision of a reviewing court with respect to others whose circumstances are similar but whose rights have not been finally decided, it is axiomatic that the General Assembly may not validly enact a statute, the effect of which is to change a decision of this court which has finally adjudicated the rights of particular parties. *Sanelli v. Glenview State Bank* (1985), 108 Ill.2d 1.

Initially, the Does contend that the amendment does not violate the separation of powers doctrine because their petition for rehearing was pending at the time the amendment became effective. Otto contends that, because this court had finally adjudicated the rights between the parties in its opinion of June 16, 1994, the amendment cannot be constitutionally applied to his case. We agree. This court has held that the filing of a petition for rehearing does not alter the effective date of the judgment of a reviewing court unless that court allows the petition for rehearing, in which event the effective date of the judgment is the date that the judgment is entered on rehearing. (*PSL Realty Co. v. Granite Investment Co.* (1981), 86 Ill.2d 291.) Since the petition for rehearing was denied in this case, as was the petition for writ of *certiorari* to the United States Supreme Court, the effective date of judgment was June 16,

1994. On that date, the rights between the parties were finally adjudicated by this court, rendering the subsequent amendment constitutionally inapplicable.

*15 The Does counter that issues of pendency and finality are distinct and that legislation passed after the final adjudication of rights but while petitions for rehearing are still pending can be constitutionally applied retroactively. Though the cases cited by the Does stand for the propriety of applying a new enactment to a pending case when that enactment becomes effective at any stage in the litigation, none of those cases involved an amendment which attempted to alter the vested rights of parties to the litigation after this court had finally adjudicated them. (*See General Telephone Co. v. Johnson* (1984), 103 Ill.2d 363 (retroactive change in a taxing statute); *Schlenz v. Castle* (1981), 84 Ill.2d 196 (curative act validating late publication of real estate tax assessments).) Rather, the cases involved changes to rights that were not vested, thus rendering the otherwise unconstitutional retroactive changes constitutional.

As regards the instant case, this court found on June 16, 1994, that Otto had been improperly denied a most fundamental right, the right to the care, custody and control of his son. Because we subsequently denied rehearing on our decision to vacate the adoption, the date of the final adjudication of Otto's resulting right to custody of Richard for purposes of the instant separation of powers review remains June 16, 1994. (*See PSL Realty*, 86 Ill.2d at 305.) Thus, the amendment to the Adoption Act cannot be constitutionally applied retroactively.

Our conclusion is further buttressed by this court's decision in *In re Marriage of Cohn* (1982), 93 Ill.2d 190. In *Cohn*, this court considered the applicability of an amendment to the Marriage and Dissolution of Marriage Act passed by the legislature after the appellate court's resolution of the case, but prior to this court's reviewing opinion. Noting that the legislative history clearly showed that the legislative action was explicitly taken in order to

reverse the result reached by the appellate court, this court refused to apply the amendment to the case. (*Cohn*, 93 Ill.2d at 202-07.) This court reiterated that although the legislature may change the law as interpreted by the courts prospectively, it cannot retroactively alter a statute with the explicit intent to overrule the decision of a reviewing court. *Cohn*, 93 Ill.2d at 205.

Though the Does acknowledge this court's holding in *Cohn*, they assert that the *Cohn* separation of powers analysis should not be employed in the instant case because, in enacting the amendments at bar, the legislature did not attempt to overrule this court's June 16, 1994, decision vacating the adoption. Rather, the Does argue that the legislature merely sought to make clear what happens after an adoption is vacated, as opposed to alter this court's vacation of the actual adoption. The Does' attempt to distinguish the vacation of the adoption of Richard from what happens after the vacation the adoption is without merit. Separation of powers analysis requires an examination of the effect a change in retroactive legislation will have on the substantive rights of parties already announced by a court and does not turn upon inconsequential distinctions. Earlier in this opinion, we noted that prior to the instant amendment, the vacation of an invalid adoption results in the automatic reversion of custody to any fit parent who has not otherwise consented to the relinquishment of his or her rights to the care, custody and control of the child. Insofar as Otto is fit and has not consented to Richard's adoption, he cannot now be divested of his right to the care, custody and control of Richard by the General Assembly's hastily enacted amendment attempting to overturn the decision of this court.

***16** Looking to the legislative history, as this court did in *Cohn*, we note that the legislature passed the amendment at issue to alter the effect of our June 16, 1994, opinion vesting custody of Richard with Otto. Any doubt in this regard is belied by the readings of the bill before the Senate:

"SENATOR TROTTER: *"They're already in the Supreme Court. So they've gone before three tribunals. The way the language [of the amendment] reads, it says, in fact, that they [the Does] can--they can ask for a new case. So are we circumventing the courts at this time?*

* * *

SENATOR CRONIN: *Well, first of all, the Supreme Court would have to agree to hear a petition to entertain the idea of remanding this case. They'd have to overturn their decision. They'd have to reconsider their--their unanimous decision, and they'd have to overturn that decision and then remand it to the circuit court. While my personal sympathies are with the adoptive parents, and I think that there are some problems with that case from the outset, my main objective in this legislation is prospective, to insure that Baby Richard cases don't happen again.*

* * *

SENATOR TROTTER: *The question is, then--then why are we having an immediate effective date? If you're not--your intent is not to have an impact on the Baby Richard's case and only on the prospective cases, then why are we saying we have the immediate effective date, which will more than likely have an impact on something that's already gone through these three tribunals, which is the system that we've set up here in this State?*

* * *

SENATOR CRONIN: *Maybe I misspoke, or maybe I--said something that was confusing. I can't tell you what the outcome is going to be in terms of its impact on the case. Whether this bill does have an impact on this case is something for the justices to decide. I--I--I--my intent is, yes, that it would have an impact on Baby Richard and all other cases in the future that are similarly situated."*

(Emphasis added.) 88th Ill. Gen. Assem., Senate Proceedings, July 1, 1994, at 37-38.

This court will not be blind to the circumstances surrounding the enactment of a statute in determining whether it violates separation of powers principles. The legislative branch of Illinois' three-branch government cannot sit as a reviewing court over the decisions of the judicial branch which has adjudicated a suit at law and established and articulated the legal rights of the parties to the litigation. To hold otherwise would render the separation of powers doctrine a nullity and threaten the very fabric of our democracy.

DUE PROCESS RIGHTS OF RICHARD

The final argument raised both by the Does and Richard's guardian *ad litem* is that Richard himself has a liberty interest in the familial relationship he has developed with the Does. In making this argument, the Does and the guardian *ad litem* fail to address the liberty interest Richard may have in being with his natural father. The United States Supreme Court has never decided whether a child has a liberty interest symmetrical with that of a natural parent in maintaining his current relationship. (*Michael H. v. Gerald D.* (1989), 491 U.S. 110, 130, 105 L.Ed.2d 91, 110-11, 109 S.Ct. 2333, 2346.) Attempts to assert such a right on behalf of children who have become psychologically attached to a nonparent have not met with success. (*See In re Baby Girl Clausen* (1993), 442 Mich. 648, 502 N.W.2d 649.) We likewise hold that no such liberty interest exists as regards Richard's psychological attachment to the Does. To hold otherwise would be to overturn the entire jurisprudential history of parental rights in Illinois.

***17** In *Smith v. Organization of Foster Families for Equality & Reform* (1977), 431 U.S. 816, 53 L.Ed.2d 14, 97 S.Ct. 2094, one of the questions before the Supreme Court was whether foster children who have lived in a foster home for an extended period of time, and who have developed a psychological bond with the foster family, have a liberty interest in remaining with that foster family.

In addressing this issue, the Court declined to decide whether such a liberty interest existed. Rather, the Court determined that the procedural safeguards employed by New York in removing children from their foster families were constitutionally sufficient to protect whatever interest might be at issue. (*Smith*, 431 U.S. at 847-56, 53 L.Ed.2d at 37-42, 97 S.Ct. at 2111-15.) The Court did, however, make clear that as between foster parents and natural parents, any such liberty interest on the part of the child was substantially attenuated absent a finding of unfitness or the like. *Smith*, 431 U.S. at 846-47, 53 L.Ed.2d at 36-37, 97 S.Ct. at 2110-11.

The concurring Justices argued that the majority was illogical in considering due process as regards the removal of children from foster families without first establishing that there was a liberty interest, an interest the majority declined to assert existed. (*Smith*, 431 U.S. at 858-59, 53 L.Ed.2d at 44, 97 S.Ct. at 2117.) The concurring Justices further noted that the grievous losses, psychological, emotional and otherwise, that foster children might suffer upon removal to another family did not, in and of themselves, create a liberty interest in the continued maintenance of that relationship. (*Smith*, 431 U.S. at 858, 53 L.Ed.2d at 44, 97 S.Ct. at 2117.) Rather, it is the nature and not the weight of the purported loss that determines whether a liberty interest exists. (*Smith*, 431 U.S. at 858, 53 L.Ed.2d at 44, 97 S.Ct. at 2117; *see also Board of Regents v. Roth* (1972), 408 U.S. 564, 570-71, 33 L.Ed.2d 548, 557, 92 S.Ct. 2701, 2705-06.) Turning then to the nature of the liberty interest asserted by the foster children to the continued placement with their foster parents, the concurring Justices stated they would squarely hold that the interests asserted by the foster children are not of a kind that the due process clause of the fourteenth amendment protects. (*Smith*, 431 U.S. at 858, 53 L.Ed.2d at 44, 97 S.Ct. at 2117.) While children have a due process liberty interest in their family life, that interest is not independent of the child's natural parents' interest absent a finding of unfitness.

A similar conclusion is compelled in the instant case. As Justice Stewart concluded in *Smith* upon considering the rights of foster families *vis-a-vis* natural parents to the care, custody and control of the children: "If a state were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, * * * [this] would have intruded impermissibly on the private realm of family life which the state cannot enter.'" (*Smith*, 431 U.S. at 862-63, 53 L.Ed.2d at 46-47, 97 S.Ct. at 2119, quoting *Prince v. Massachusetts* (1944), 321 U.S. 158, 166, 88 L.Ed. 645, 652, 64 S.Ct. 438, 442.) Likewise, the putative family relationship that the Does have deceitfully established with Richard, and which has come about in derogation of the procedural safeguards afforded fit fathers under the Adoption Act, cannot now be legitimated.

CONCLUSION

***18** It would be a grave injustice not only to Otakar Kirchner, but to all mothers, fathers and children, to allow deceit, subterfuge and the erroneous rulings of two lower courts, together with the passage of time resulting from the Does' persistent and intransigent efforts to retain custody of Richard, to inure to the Does' benefit at the expense of the right of Otto and Richard to develop and maintain a family relationship. Moreover, the laws of Illinois, as hereinabove set forth, clearly compel us to order Richard delivered to his father, Otakar Kirchner. Accordingly, we ordered the writ of *habeas corpus* to issue on January 25,.1995, and we hereby reaffirm that order.

We note, finally, that we have considered the dissents offered in this case. The dissent by Justice McMorrow departs from the record, misstates the facts and misinterprets the law. It is, quite simply, wrong in its assertions and wrong in its conclusions. We reiterate that the recitation of facts covered in the majority *per curiam* opinion is well documented in the record of proceedings and that the authorities upon which we have relied solidly support the

conclusions we have reached in support of the issuance of the writ of habeas corpus. Writ awarded.

Justice MILLER, dissenting:

I do not agree with the majority that we can now conclude, on the evidence before us, that the Does lack standing to request a custody hearing on behalf of the minor child they have unsuccessfully attempted to adopt. A number of factual questions must be resolved before a determination of the Does' standing can be made. Because these threshold issues have not yet been decided, I would direct the circuit court to consider, on an expedited basis, the matters pertinent to this inquiry.

This court's prior decision did not address, much less resolve, the issues raised in the present case. In a majority opinion, and in a separate concurring opinion joined by three members, this court previously determined only that the finding of unfitness entered by the circuit judge could not stand, and that Kirchner's parental rights had therefore been improperly terminated. (*In re Petition of Doe* (1994), 159 Ill.2d 347.) The earlier case did not decide whether Kirchner's biological relationship to the child is paramount to all other considerations, as Kirchner argues, or, instead, whether a separate hearing should now be conducted to determine what custodial disposition would be in the child's best interests, as the Does contend.

The Does base their right to seek a custody hearing on section 601(b)(2) of the Illinois Marriage and Dissolution of Marriage Act, which provides that a custody hearing may be initiated "by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents." (750 ILCS 5/601(b)(2) (West 1992).) Once the standing requirements of section 601 are satisfied, section 602 directs the court to "determine custody in accordance with the best interest of the child." (750 ILCS 5/602 (West 1992).) The court is to consider

all relevant circumstances in making that determination, and the statute lists a number of matters that should be considered.

*19 The majority concludes that the Does lack standing under section 601(b)(2) to seek a custody hearing on behalf of Baby Richard because the biological father did not voluntarily relinquish custody of the child and because the Does participated in Daniella's deception of Kirchner. In addition, the majority believes that, upon the reversal of an adoption decree, custody of the child involved must automatically vest in a parent whose rights would otherwise have been terminated by the decree.

As a preliminary matter, I do not agree with the majority that reversal of the adoption decree must necessarily vest custody of the child in Kirchner. The majority recognizes that the Adoption Act (750 ILCS 50/5 through 24 (West 1992)) does not specify the consequences of an adoption decree that is overturned on appeal, yet the majority believes that the procedural safeguards afforded unwed fathers "militate that fathers be placed in the same legal position" afterwards. (Slip op. at 15-16.) To the majority, this can be accomplished only by granting the biological parent immediate and exclusive custody of the child, even though the unwed father in this case did not have custody before the adoption.

The majority's conclusion, however, ignores the essential differences between the custody hearing the Does now seek pursuant to sections 601 and 602 of the Marriage and Dissolution of Marriage Act and their earlier, unsuccessful petition to adopt the child. Although these are distinct actions with dramatically different consequences, the majority opinion virtually conflates the two. (Slip op. at 16.) Unlike an adoption decree, however, a custody determination made pursuant to section 602 does not result in a termination of parental rights. *See In re P.F.* (1994), 265 Ill.App.3d 1092, 1100-01; *In re S.J.K* (1986), 149 Ill.App.3d 663, 673.

I would note further that the death of a custodial parent following a divorce decree does not automatically vest the surviving parent with custody of a minor child. (*See In re Marriage of Nicholas* (1987), 170 Ill.App.3d 171, 178; *In re Custody of McCarthy* (1987), 157 Ill.App.3d 377, 383; *Milenkovic v. Milenkovic* (1981), 93 Ill.App.3d 204, 212.) The majority seeks to distinguish these cases on the ground that the Probate Act specifically authorizes a court to place custody of a minor with a third party on the death of the custodial parent. (*See* 755 ILCS 5/11--7 (West 1992).) What the majority overlooks, however, is that section 601(b)(2) can perform a similar function in cases such as this, allowing a court to award custody to a third party rather than to a parent. Again, it must be recalled that the Does do not now seek to terminate Kirchner's parental rights.

The majority denies standing to the Does under section 601(b)(2) on the grounds that Kirchner did not voluntarily relinquish custody of the child and that the Does took part in the scheme that allegedly deprived Kirchner of his parental rights. The first reason cited by the majority is not applicable here; the second reason requires a factual determination that should initially be made on a fully developed record in the trial court.

***20** The requirement of a voluntary relinquishment of the child by his or her biological parents is intended to discourage child abductions and other illicit self-help measures that would otherwise grant a third party standing pursuant to the literal terms of section 601(b)(2). (*In re Custody of Barokas* (1982), 109 Ill.App.3d 536, 544.) This sensible limitation on the availability of relief under that provision is not implicated in the present case, however. Kirchner never had custody of the child to begin with, and therefore he had nothing to relinquish. Indeed, the majority's construction would erect an insuperable bar to the application of these provisions in any case involving an unwed father who is absent at the time of the child's birth and whose parentage is not established prior to the mother's consent for adoption. If one accepts the majority's view

that a biological parent must have voluntarily relinquished custody over the child before a nonparent can have standing under section 601(b)(2), then an unwed father who has never had custody will find himself in a more advantageous position than a married father whose conduct could be found to amount to a voluntary relinquishment.

The majority also concludes that standing must be denied to the Does because they took part in Daniella's deception of Kirchner. I agree with the majority's premise that a nonparent seeking standing under section 601(b)(2) must not have acted illicitly in gaining custody of the child. That inquiry, however, raises a number of important factual questions that have not previously been resolved. Indeed, determinations of standing under section 601(b)(2) are fact-intensive inquiries that require consideration of a number of circumstances. (*In re Kulawiak* (1993), 256 Ill.App.3d 956, 961-62.) Nonetheless, the majority proceeds to resolve these issues without the benefit of a factual record adequate to support the opinion's conclusions.

An example drawn from the majority's numerous attempts to prejudge the facts in this case will illustrate the difficulty of making these important determinations on the basis of the materials currently before us. The majority suggests that the Does, intending to advance Daniella's scheme to keep the birth of the child a secret from Kirchner, prevailed upon Daniella to give birth to the child in a hospital different from the one originally selected by her and Kirchner. (Slip op. at 2.) Contrary to the majority's view, however, the evidence presented at the adoption hearing does not resolve this question. The Does did not testify at the adoption hearing, and the record does not show whether they acted in the manner ascribed to them by the majority, or instead whether they or Daniella had legitimate reasons for choosing the particular hospital where the birth occurred. It should be noted, however, that the Does, who were paying the costs of the delivery, lived quite close to the hospital in question, which could well have been the

facility they used for their own medical needs. In addition, it appears that the hospital where the child was born was closer to Daniella's uncle's house in Hillside, where Daniella was then living, than was the hospital she and Kirchner had initially selected in their former neighborhood.

*21 The majority's conclusion that the change in hospitals was part of a scheme to deceive Kirchner is not fairly supported by the evidence now before us; on this record, we simply do not know what led the Does to pick the hospital at issue. This question, and the many other questions raised in the majority opinion regarding the. conduct of the adoptive parents and their attorney, should be resolved through an evidentiary hearing, and not on the basis of adverse inferences derived from a previous hearing in which the biological father was found unfit. Unlike the majority, I do not believe that either the slim record in this *habeas* proceeding--an original action in this court, without an evidentiary hearing below-or the lengthier record developed in the earlier adoption action permits us to resolve these questions at this time. Moreover, although the adoption action raised some of the matters pertinent here, the judge who presided at the earlier proceeding did not make, and was not called upon to make, factual determinations that would have preclusive effect on the issue of the Does' standing. The majority's efforts to resolve these questions of fact in this opinion are premature, and I would await a full and complete hearing at which the Does would have the opportunity to testify before deciding the circumstances of the failed adoption.

Pending in the circuit court of Cook County is a petition filed by the Does in which they seek custody of Baby Richard pursuant to sections 601 and 602. In the exercise of our supervisory authority (Ill. Const.1970, art. VI, s 16), I would direct the trial judge in that case to consider, on an expedited basis, the question of the Does' standing. At that time the parties could present testimony and other evidence concerning the manner in which the Does acquired custody of Baby Richard. If the judge below found

that the Does did in fact have standing, the judge could then proceed, again on an expedited basis, to the best-interests hearing contemplated by section 602.

If a hearing were to become necessary, Kirchner could then assert the presumption recognized by our law that parents whose rights have not been properly terminated have a superior claim to the custody of their offspring. (*People ex rel. Edwards v. Livingston* (1969), 42 Ill.2d 201, 208-10.) This court has previously described the nature of the presumption that operates in favor of biological parents:

> "In child-custody disputes it is an accepted presumption that the right or interest of a natural parent in the care, custody and control of a child is superior to the claim of a third person. The presumption is not absolute and serves only as one of several factors used by courts in resolving the ultimately controlling question of where the best interests of the child lie. [Citations.] A court need not find that the natural parent is unfit or has forfeited his custodial rights before awarding custody to another person if the best interests of the child will be served. [Citations.] This standard or 'guiding star' [citation] is a simple one designed to accommodate the often complex and unique circumstances of a particular case." *In re Custody of Townsend* (1981), 86 Ill.2d 502, 508.

*22 As Townsend explains, the presumption in favor of a biological parent is not dispositive. A court conducting a custody hearing pursuant to section 602 must also consider other relevant circumstances. If the Does were found to have standing to seek a custody hearing, Kirchner would have an opportunity to assert the presumption favoring a biological father whose parental rights have not been terminated and to maintain that Richard's best interests require that custody of the child be placed with him. I believe that these procedures would be sufficient to protect the constitutional rights Kirchner possesses as an unwed father. (*See Lehr v.*

Robertson (1983), 463 U.S. 248, 77 L.Ed.2d 614, 103 S.Ct. 2985; *Quilloin v. Walcott* (1978), 434 U.S. 246, 54 L.Ed.2d 511, 98 S.Ct. 549.) Because I believe that sections 601(b)(2) and 602 together are capable of granting the Does the relief they now seek, I do not consider here the operation or scope of the recent amendment to the Adoption Act that the Does contend also applies to this case (*see* Pub. Act 8 & -550, eff. July 3, 1994 (adding 750 ILCS 50/20(b)).

Because significant factual questions remain to be resolved in this matter, I would dismiss the complaint for a writ of *habeas corpus* filed by Kirchner in this court and would allow the custody action previously initiated by the Does in the circuit court of Cook County to go forward on an expedited basis. That court, with its ability to receive evidence, is the proper forum to initially determine whether, as a threshold matter, the Does have standing to seek custody of Baby Richard, and, if so, what custodial disposition would be in the child's best interests, considering the presumption in favor of a biological father and the unique circumstances presented here.

Justice McMORROW, dissenting:

"THE GOOD OF THE PEOPLE SHALL BE
THE HIGHEST LAW."

Cicero 106-143 B.C.

Today, by its total failure to recognize the rights of the child who has come to be known as "Baby Richard" and the rights of adoptive parents in the circumstances of this case, the majority grants Otakar Kirchner the unfettered right to remove Richard, almost four years old, from the only home and parents he has known. This ruling is extraordinary and in contravention of Illinois law and constitutional protections: the majority permits Richard to be taken by Kirchner from his home of the past four years, and be placed in the home occupied by a man and woman Richard has never seen or known. Significantly, the transfer into the home of

these total strangers to Richard is ordered by the majority without any hearing to determine how and when such transfer should occur, and whether the home into which Richard is being placed is in his best interests. In abdication of its duty to minors, and irrespective of the fact that there has never at any time been a hearing at the trial court level at which a record would be developed, the majority issued the writ of *habeas corpus* to forthwith turn over the child to Kirchner.

*23 The majority today sanctions the placement of this child into a home that is strange to him. The majority permits this transfer, although the court has little knowledge of the fitness of the occupants of that home or of the environment in that home. Indeed, the court knows nothing about the character of Kirchner, except that which surfaced from testimony at the adoption hearing. Testimony from various witnesses indicated that the biological mother of the child had characterized Kirchner as being abusive, that she sought and procured residence in a shelter for abused women; that he was a gambler (Kirchner himself testified that he won $28,000 by gambling in Atlantic City in September 1991); that he was too busy to get married to the woman with whom he lived and impregnated, even though they had procured two marriage licenses. This court knows nothing about Kirchner other than the above, and yet, by its ruling, has refused Richard an evidentiary hearing to determine what is in his best interests. It is significant that the child will live in the home occupied by Kirchner and his biological mother, Daniella, who married Kirchner after adoption proceedings were instituted by the Does. Daniella willingly gave up her parental rights to the child, agreed to the adoption, and consistently indicated to the attorney for the Does and the child welfare agency investigating the Does that she would not disclose the identity of the child's father. As stated, she will, along with Kirchner, by this court's order, have Richard living in her home. Thus, Daniella's deceit is being rewarded and she is able to circumvent her relinquishment of maternal rights and custody by this court's ruling.

I dissent because the ruling of the majority is a radical departure from Illinois law of long standing, and is in contravention of the protection given to Richard by the Federal and State Constitutions. More specifically, I dissent for the following reasons: (1) The application of pertinent sections of the Illinois Marriage and Dissolution of Marriage Act entitle the Does to initiate a custody proceeding to determine the best interests of the child. Illinois law not only recognizes the standing of adoptive parents in the circumstances of the Does in the instant case, but Illinois case law also recognizes such adoptive parents as being necessary parties to custody litigation. (2) The most recent amendments to the Adoption Act mandate that a custody hearing at which the best interests of the child would be considered should take place after an adoption has been vacated. (3) The procedural due process rights of Richard under the Federal and State Constitutions have been denied to him by this court's ruling. Virtually the entire focus of the majority opinion relates only to the rights of Kirchner, and ignores the rights of Richard and the Does. (4) The presumption that the natural parent, Kirchner, represents the best interests of the child does not obtain in the facts of this case. Indeed, the majority's determination that "no one, not even Richard's guardian *ad litem*, stands in a better position than Otto to represent the interests of his son" is clearly erroneous. In fact, Kirchner's interests are adverse to and in conflict with the child's best interests. Consequently, the general presumption should fail. Allowance of the petition for *habeas corpus*, to which I objected, was not well founded. ***24** (5) The majority's conclusions appear to be premised on the fitness of Kirchner, and the majority's unconscionable attribution of fraud, deceit, perjury, and subterfuge to the Does. Perhaps this is the only way the majority can justify its conclusions. However, the record is devoid of evidence that the Does engaged in the conduct ascribed to them by the majority. Rather, the Does' custody of Richard was at all times pursuant to law and court order, affirmed on appeal.

For the foregoing reasons, and the analysis contained further in this opinion, I dissent.

CORRECTION OF FACTS

Contrary to the majority's statement of the history of this case, I found no evidence in the record to support the repeated charges of "deceit," "lies," and "subterfuge" on the part of the Does and their attorney in connection with the adoption of the child. Kirchner's affirmative defense to the adoption raised the issue of deceit on the part of Daniella, to whom he was married at the time of the adoption hearing on the termination of his paternal rights. He and Daniella testified at that hearing that the two had not sooner married, because he was too busy to arrange a day off that matched her schedule. The baby was born on March 16, 1991, and the Kirchners married in September of that year, at about the time Kirchner filed his petition for declaration of paternity.

Kirchner admitted at the hearing that Daniella never told him that the baby died and that he did not believe it when Daniella's uncle said the baby was dead. The Does did not testify, and Daniella never said that the Does or their attorney suggested or assisted in her scheme to hide from the biological father, whom she described to the Does' attorney as "abusive" and a "heavy gambler." Testimony of Daniella reveals that when she met the Does she was staying in a shelter for abused women and had signed a contract with that shelter indicating that she was a victim of abuse. She later moved to her uncle's house in a suburb, and gave the Does' attorney her telephone number and address at that location. She admitted at the hearing that she refused at all times to disclose the identity of the man who fathered her child and there is no indication that she ever gave the Does, their attorney, or the investigator from the Cook County Department of Supportive Services any information to help them locate him. Further, there is nothing in the record to indicate that the Does or their attorney had or were able to obtain information regarding Kirchners identity or residence. Similarly, there is nothing in the record to establish

that the Does or their counsel knew of friends or relatives who might have revealed Kirchner's identity or whereabouts.

The record further reveals that while Daniella was discussing the adoption with the Does and their attorney, she was simultaneously calling Kirchner, meeting him at a restaurant, and, two weeks before giving birth, visiting him in his apartment where they engaged in sexual intercourse. The record also indicates that Kirchner had her telephone number at the shelter and was immediately aware of her moving into her uncle's house. The record does not indicate that the Does were aware of Daniella's continued contacts with Kirchner, or the fact that he knew where she was at all relevant times.

*25 The record does not support the majority's statement that the Does and their attorney abetted Daniella's scheme to deceive Kirchner. The record does not support the majority's apparent belief that the Does arranged for Daniella to give birth in a suburban hospital, rather than the Chicago hospital near Kirchner's apartment, in order to prevent Kirchner from locating her. At the time she gave birth she was living with her uncle in a suburb, not in Chicago. Moreover, the transcript of the hearing contains an admission by Kirchner that some time after the baby's March 16, 1991, due date, he telephoned her in the hospital. Although he also testified that he called various hospitals and attempted to verify whether the baby had died, by looking through the uncle's garbage cans for diapers, Kirchner admitted that he knew as early as April 1991 that the baby had not died. He did not seek legal counsel at that time, he testified, because "[e]verything takes time."

Daniella moved back into Kirchner's apartment on May 12, 1991, 57 days after the baby's birth. Although Kirchner was then told of the adoption, he did not immediately seek to intervene in the adoption or seek a declaration of paternity and temporary custody of the child. Instead, on June 6, 1991, approximately 82 days after the baby's birth, an attorney filed an appearance on behalf of "Otto Kirchner." The record reveals that the appearance filed on behalf

of Kirchner did not identify Kirchner as the putative biological father or the husband of Daniella. Therefore, on that date Kirchner was merely a name to the Does, as far as the court record indicates. Kirchner's appearance was not accompanied by an answer to the adoption petition or other pleading setting forth his claim to be the biological parent of the child. Therefore, there was nothing for the Does and their attorney to respond to, contrary to the majority's statement that as of June 6, 1991, "the adoption proceedings were rendered wholly defective * * * [and] the Does had both a legal and moral duty to surrender Richard to the custody of his father. * * * Instead, the Does selfishly clung to the custody of Richard. They have prolonged these painful proceedings. (Emphasis added.)" (Slip op. at 3.) Such statement by the majority is patently unfair and legally inaccurate. The record shows that as of June 6, 1991, the date on which the majority believes that the Does had a legal and moral duty to surrender Richard to the custody of Kirchner, the only document of record was a bare appearance filed by an attorney on behalf of Kirchner. In September 1991, Kirchner filed a petition for declaration of paternity. It was not until several months later, in December 1991, that Kirchner's paternity with respect to the child was ever established by the trial court. At no time did the trial court ever vacate, modify, or reverse its order granting the Does custody of the child. For the Does to turn over custody of the child on June 6, 1991, to Kirchner, who was a total stranger at that time, would have been grossly irresponsible and a violation of the trial court's order appointing them as the child's legal custodians. Again, there was no duty, moral or legal, for the Does to surrender the child to Kirchner.

***26** Nothing in the record supports the majority's further statement, "After prolonged procedural posturing on the part of the Does, a hearing was finally had on Otto's petition to defeat the adoption." (Slip op at 3.) I found no indication in the record that the delays in the hearing were attributable to anything other than standard discovery requirements to prepare for the hearing. At no time did Kirchner move to expedite the proceedings. Finally, I am

concerned that the majority's opinion places an unprecedented burden on prospective adoptive parents in this State to fully investigate the circumstances of the man who purports to be the biological, unwed partner of the birth mother. The majority reasons that the Adoption Act "intentionally place[s] the burden of proof on the adoptive parents * * * [to make] a good- faith effort to notify the natural father of the adoption proceedings. [Citation.]" (Slip op. at 5, citing 750 ILCS 50/7 (West 1992).) According to the majority, the adoptive parents failed to sustain this burden in the present case, because they "knew that a real father existed whose name the birth mother knew," they "knew that the father, if contacted, would not consent to the adoption," yet they made no "effort to learn the name of the father and to give him notice" of the adoption proceedings. Slip op. at 5. The majority's imposition of a duty on the part of adoptive parents to investigate the identity and residence of a putative biological father is unsupported in Illinois law. The provision of the Adoption Act cited by the majority (750 ILCS 50/7 (West 1992)) places no duty on adoptive parents to discover the identity and residence of a biological father to a child born out of wedlock. The majority cites to no Illinois or Federal law for the proposition that adoptive parents in the Does' position have a duty to investigate and determine the identity and location of the unwed father when the birth mother, for reasons of her own, adamantly refuses to reveal the identity of the person she believes is the father. The majority's unjustified imposition of such a duty in the present case is wholly unprecedented.

ANALYSIS

I. *HABEAS CORPUS* AND BEST-INTERESTS HEARING

It should be noted at the outset that throughout its opinion, the majority fails to discern the significant legal difference between the termination of parental rights in an adoption proceeding and the lesser interference with parental rights in a custody proceeding. Termination of parental rights in an adoption proceeding is regulated by the terms of our Adoption Act (750 ILCS 50/1 et seq.

(West 1992)) and may occur either upon the voluntary consent of the biological parent (750 ILCS 50/8 (West 1992)) or involuntarily, upon a finding that the parent is "unfit" (750 ILCS 50/1, 8 (West 1992)). Adoption of the child by a third party signifies a total, complete and permanent severance. of all parental rights, duties and interests that the biological parent has or may have with respect to the child.

*27 An award of custody and visitation, in contrast, derives from the Illinois Marriage Act (750 ILCS 5/601 et seq. (West 1992)). Orders of child custody and visitation under the Marriage Act do not effect a permanent termination of parental rights. Instead, custody and visitation orders provide a lawful avenue for judicial supervision over the exercise of parental rights because of a judicial determination that such custodial arrangements will serve the best interests of the child. *See* 750 ILCS 5/601 through 610 (West 1992).

The majority opinion begins its analysis of this case under the heading "Jurisdiction to Entertain the *Habeas Corpus* Petition." The majority first considers Kirchner's standing to petition for the issuance of a writ of *habeas corpus* over the objections of Richard's guardian *ad litem*. According to the majority, Kirchner has an exclusive right, presumably based on biological paternity, to act "on behalf of Richard" in pursuing the writ of *habeas corpus* to transfer custody without a best-interests hearing. The majority finds that because Kirchner's paternal rights were improperly terminated by the adoption, "no one, not even Richard's guardian *ad litem*, stands in a better position than Otto to represent the interests of his son. * * * [Kirchner] has equal if not greater standing to assert what is in his son's best interests. To the extent that [Kirchner] disagrees with Richard's guardian *ad litem*, not to mention Richard's current custodians, Otto speaks for Richard and is entitled to file a writ of *habeas corpus* on Richard's behalf." Slip op at 7-8.

These quoted statements, and the analysis proceeding therefrom, contain several legal and logical errors. First, the

statements reveal the majority's misconception of the role assigned by law to the child's court-appointed guardian *ad litem*. That role is to represent, in a court of law, no other person than Richard. Kirchner represents his own interests. The Does represent their own and Richard's interests, based on their family relationship.

Second, the majority's presumption that Kirchner, as biological father, acts in Richard's best interests fails in the context of a custody battle. In child custody litigation "a child of the parties * * * becomes a ward of the court, and the court has the authority and the responsibility to act for the child's care, custody and support until it reaches majority. In discharging this responsibility the court's primary concern obviously is not the wishes of the parents but rather the best interests of the child. (Emphasis added.)" (*Sommer v. Borovic* (1977), 69 El.2d 220, 233.) When Daniella terminated her parental rights four days after Richard's birth, she effectively placed Richard in the care of the State of Illinois. When this court vacated the adoption, the child became a ward in the court-ordered temporary custody of the Does.

Third, the majority's statements reveal its fundamental misunderstanding of the historical role of *habeas corpus* in child custody matters, which was to furnish the procedure by which persons in Kirchner's position could invoke the jurisdiction of the circuit court and obtain a hearing on custody. Such hearing required the taking of evidence to determine what placement would be in accord with the child's best interests. Typically, a petition for *habeas corpus* was the procedural mechanism for deciding custody outside of divorce or adoption proceedings (*see Giacopelli v. Florence Crittenton Home* (1959), 16 Ill.2d 556 (dispute between natural father and adoptive parents); *People ex rel. Elmore v. Elmore* (1977), 46 Ill.App.3d 504 (dispute between unwed parents)). A natural parent who sought to obtain his or her child after the child had been living in the custody of others was required to file a *habeas corpus* action in the circuit court and participate in a best-interests hearing. (*See, e.g., People ex rel. Strand v.*

Harnetiaux (1970), 46 Ill.2d 424 (dispute between natural mother and paternal grandparents); *People ex rel. Edwards v. Livingston* (1969), 42 Ill.2d 201 (dispute between natural father and his parents).) Although Kirchner styled his pleading to invoke this court's original jurisdiction as a complaint for writ of *habeas corpus*, his objective was not to obtain a hearing for Richard but to prevent one. In *People ex rel. Bukovich v. Bukovich*, (1968, 39 Ill.2d 76, this court observed, "While decisions of this court are infrequent in child custody matters, it is apparent from both our opinions and those of the appellate court that it is proper in this State for a court in a *habeas corpus* proceeding to look into the question of child's best interest, before awarding custody. [Citations.]" (*Bukovich*, 39 Ill.2d at 79; *see also Mahon v. People* (1905), 218 Ill. 171 (in *habeas corpus* proceedings for child custody, best interests of child must be considered).) I am aware of no Illinois precedent that supports the action of the majority in using its habeas powers to transfer custody of a child from an established home and family into a new, unfamiliar, and possibly even harmful environment, without any court investigation of facts or supervision of the transfer.

***28** Fourth, no person has challenged Kirchner's standing to participate in a custody hearing; but by framing the issue as whether Kirchner has superior "standing" to procure his son's custody by plenary writ, the majority seems to believe that Kirchner is entitled to an irrebuttable presumption, based solely on biology, that he, alone, represents Richard's "best interests." Under this newly minted law, unsupported by cases, the majority grants Kirchner unfettered power to dictate the terms and conditions under which the child he has never seen shall be taken from his current home and family. The impropriety of such a novel holding is exposed by a long line of Illinois cases which emphasize that when custody of child is in issue, the guiding legal principle is not the so-called "superior right" of natural parents over third parties. Rather, such right "only obtains when it is in accord with the best interest of the child. [Citations.]" (*Giacopelli*, 16 Ill.2d at 565;

see also, e.g., Sullivan v. People ex rel. Heeny (1906), 224 Ill 468, 477 (holding that vacation of an adoption for lack of notice to biological father did not require vesting of custody in father if contrary to child's best interests).) The *Giacopelli* court posed this key question, "Giving full consideration to the primary and superior right of the natural parents to the custody of their child, what does the best interest of the child demand?" *Giacopelli*, 16 Ill.2d at 566.

Because *Giacopelli* obviously contradicts the majority's newly created law of biological determinism, the majority overrules *Giacopelli*. Not only is the holding of *Giacopelli* declared unconstitutional under Federal law but also wrongly decided. (Slip. op at 8.) The majority cites *Quilloin v. Walcott* (1978), 434 U.S. 246, 255, 54 L.Ed.2d 511, 520, 98 S.Ct. 549, 555, in support of its reasoning that Kirchner need not be "subjected to a best-interests hearing without first being found unfit." As will be shown in a later portion of this dissent, United States Supreme Court cases do not support Kirchner's biologically based claim of immediate and exclusive entitlement to Richard without regard for the rights Illinois law grants to the Does and to Richard.

The majority also misstates the holding of *Giacopelli*, by characterizing it as a case which "allows the termination of parental rights in adoption proceedings without a finding of unfitness." (Slip op. at 12.) *Giacopelli* was a custody hearing in which the mother who had voluntarily given up her child for adoption joined in her husband's attempt to reclaim the baby several months later. Evidence at a best-interests hearing to consider the father's claim for custody revealed that he had committed crimes and was of questionable character. *Giacopelli* upheld the trial court's custody decision, based on the evidence. *Giacopelli* did not hold that an adoption may proceed without the termination of a parent's rights.

***29** The majority manifests further confusion with its erroneous assertion that *Giacopelli* does not comport with *In re Custody of Townsend* (1981), 86 Ill.2d 502. In Townsend, this court recognized that the superior right doctrine in custody cases was but

one factor in the best-interests determination. Significantly, in Townsend, as in *Giacopelli*, and *Sullivan*, this court's review was from evidentiary hearings relating to the child's best interests. In such hearings, the circuit courts considered facts relating to the natural parent's fitness at the time of the hearing on custody. In the case at bar, this court has precluded the circuit court from examining any evidence about anything pertinent to custody, including Kirchner's fitness at the present time and the placement of Richard in a home with the mother who voluntarily gave him up for adoption while having her uncle tell Kirchner the child died.

In *People ex rel. Edwards v. Livingston* (1969), 42 Ill.2d 201, this court reviewed the evidence adduced in a *habeas corpus* action brought by a natural father to remove his son from the care of the paternal grandfather. On behalf of a unanimous court, Justice Ward wrote:

> "The best interest of the child is the standard and it is not necessary that the natural parent be found unfit or be found to have legally forfeited his rights to custody, if it is in the best interest of the child that he be placed in the custody of someone other than the natural parent." (Emphasis added.) (*Livingston*, 42 Ill.2d at 209, citing *Giacopelli*, 16 Ill.2d 556.)

In *Livingston*, the trial court heard evidence, which included the opinion of an expert that it would be emotionally and psychologically harmful to remove the boy from his grandfather's home, where he had lived virtually all of his life. Notwithstanding this evidence, the trial court ruled that it was in the boy's best interests to be given to the natural father. This court reversed, holding that the trial court's conclusion was against the manifest weight of the evidence. Noting that the boy and his father were strangers to each other and the child was happy and well-adjusted in his grandfather's home, this court held that the child should be returned to the paternal grandfather's custody, but that the father

should be given liberal visitation rights with the view toward developing a relationship with his 12-year-old son.

The majority purports to distinguish *Livingston* from the case at bar as being a "probate case" rather than an "adoption case," and therefore subject to different statutory provisions. The majority's protestations ring hollow. As previously stated, the case at bar is no longer an "adoption case" but has become a custody matter. The reason for a custody hearing is not to circumvent this court's vacation of the adoption; instead, it is to ensure that a child who became a ward of the State upon the birth mother's relinquishment of her rights is accorded the protections afforded the child by Illinois law and constitutional due process.

***30** More recently, this court unanimously rejected the use of summary judgment procedure to restore a natural parent's custody rights when the child had been in the care of another for years. (*In re Estate of Whittington* (1985), 107 Ill.2d 169.) In *Whittington*, the legal guardian of a young boy was the child's great aunt. The guardian cared for the boy during the natural mother's confinement in a mental institution after being acquitted, by reason of insanity, of killing her husband. The mother sought the return of her child after she was released from treatment, married, and obtained a court order terminating the conservatorship of her estate. The trial court entered summary judgment in favor of the mother, who sought to terminate the guardianship and take her child back. The appellate court reversed and this court affirmed, stating,

> "The paramount standard, then, for determining a custody dispute under the applicable statute and case law is the best interest of the child. * * * Of obvious importance in the present case is the capacity of the parties to care for a child appropriately; the length of time Richard has been in the respondent's custody; his adjustment to home, school, and community; the mental and physical health of all the parties involved; and the potential for physical violence and alcohol abuse in the

> homes in which he might be placed. Clearly, a custody decision in a case such as this requires a careful determination of the relevant facts and a sensitive weighing of a series of factors. A summary judgment proceeding is ill suited to such a determination. * * * These facts [raised in the pleadings and affidavits], as well as the effect of removing seven-year-old Richard from the home in which he has been cared for since he was two months old, can only be established and weighed at a hearing on the merits at which both parties are free to present evidence and to cross-examine each other's witnesses." (Emphasis added.) *Whittington*, 107 Ill.2d at 177-78.

In *Whittington*, the mother's rights to her child had not been terminated, but this court recognized that the child could not be restored to the mother's care without a best-interests hearing. In the case at bar, the majority expressly rejects the need for a hearing before ordering the child to be turned over to the biological father, about whom this court knows nothing, and the biological mother, whose alleged deceit of Kirchner caused this lengthy litigation to commence. The law in Illinois cannot accommodate such disparate and unequal treatment of its smallest citizens. Today, the majority of this court chooses to disregard, overrule, and abandon long-standing child custody precedent of this court.

The majority also omits discussion of the myriad appellate court cases which squarely embrace the best interests of the child principle as determining custody, even if it means that a natural parent who is not found to be unfit temporarily may lose custody to third parties. *See, e.g., Rose v. Potts* (1991), 217 Ill.App.3d 661 (while the fact that a nonparent has physical custody of a child for a substantial length of time does not neutralize the superior rights doctrine, it may, in a given case, be the determining factor in custody decisions); *In re Custody of Piccirilli* (1980), 88 Ill.App.3d 621 (affirming custody to grandparents of eight-year-old child who preferred staying with grandparents; father would be entitled to

liberal visitation); *Baehr v. Baehr* (1978), 56 Ill.App.3d 624 (evidence supported trial court's determination that it "would certainly be detrimental to the psychological adjustment of this 10-year-old boy to have the intrusion of his biological father into his life at this time").

***31** This court has recognized that where a father's rights have not been terminated but it is found that the child's best interests lies in remaining in the custody of others, the father may still seek liberal visitation privileges and the opportunity to develop the parent-child relationship. (*Livingston*, 42 Ill.2d 201; *Bukovich*, 39 Ill.2d at 81, quoting *Hohenadel v. Steele* (1908), 237 Ill.2d 229, 235 (in considering modification of custody rights, " 'decree respecting the custody of a child is exceptional in its character and is always regarded as temporary' ").) Our courts have demonstrated considerable creativity in balancing the respective custodial rights of various people. (*See, e.g., In re SJK* (1986), 149 Ill.App.3d 663 (foster parents awarded temporary custody of child where visitation by biological mother caused child considerable anxiety; court noted that mother could petition for restoration of rights in future); *In re PF* (1994), 265 Ill. App.3d 1092 (grandmother awarded custody; order did not terminate rights of biological parents, who could later petition for restoration of custody).) The majority opinion fails to grasp that subjecting Kirchner to a best-interests hearing on behalf of his son would not divest him of his parental status or his right to develop a relationship with Richard.

In the case at bar, the majority wrongly assumes that whenever an adoption is set aside, upon a reviewing court's holding that the trial court erred in terminating the biological father's rights, the adoptive parents become legal nonentities and the child, no matter his age, ipso facto becomes the rightful property of the biological father. In such a view, the child's welfare, and the familial ties between him and the adoptive family, become totally subordinated to the biological father's wishes. In its haste to restore Richard to his biological parents, the majority denies a voice to the couple who

are the only parents Richard knows. By awarding the writ, the majority of this court compels the Does to turn Richard over to virtual strangers, without any assurances that the needs of the boy will be met.

II. THE DOES' STANDING TO SEEK CUSTODY

The Does' standing to maintain their petition for custody of Richard derives from Illinois statutory and case law, including the long line of *habeas corpus* cases in which the "necessary party" status of persons in the Does' situation was never questioned. Our legislature has enacted specific provisions, pursuant to the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/101 et seq. (West 1992)) and the Adoption Act (750 ILCS 50/1 et seq. (West 1992)), which prescribe the legal procedures to be followed when a child is subject to competing daims for custody. As explained below, section 601(b)(2) of the Marriage Act implicitly provides for persons in the Does' position to petition for custody of a child who is not in the "physical custody" of a parent. Under the recent amendments to the Adoption Act, persons in the circumstances of the Doe are explicitly recognized as necessary participants in a custody hearing following a failed or vacated adoption. Significantly, the Adoption Act amendments demonstrate the legislature's clear intent to insure that long-standing custody law is not defeated by an elevation of the biological parent's rights into an automatic and conclusive presumption that the child's best interests is with that parent.

***32** My conviction that the Does have standing, or interests in the outcome of Richard's custody placement, is also partially rooted in common sense, which recognizes their central role in his life as his parents in every sense of the word except biologically. Moreover, they are the only ones who have ever had legal and physical custody of the child, following the voluntary termination of the biological mother's rights four days after the baby was bom. Case law reveals that they not only have "standing" but are

necessary and proper parties to such hearing. *E.g., Mahon v. People* (1905), 218 Ill. 171.

The majority's conclusion that the Does and the guardian *ad litem* lack standing, as a matter of law, stems in part from its erroneous premise, discussed in the previous section, that only Otakar Kirchner has standing to exclusively determine what is in Richard's best interests. Before considering what Illinois statutory law provides on the standing issue, the majority returns to its stated belief that cases of the United States Supreme Court support the supremacy of Kirchner's rights in this case. The majority reaches a holding that clearly derives from its view of Federal constitutional law, despite the majority's statement that its "decision is based solely on Illinois law." (Slip op. at 14.) The majority holds, "[W]here an unwed father is fit and willing to develop a relationship with and raise his child, but is prevented from doing so through deceit and an invalid adoption proceeding, that father is entitled to the care, custody and control of his child upon the subsequent vacatur of the invalid adoption." Slip op. at 16.

In later sections of this dissent I discuss the pertinent Federal cases in detail and explain why I believe that the majority's due process analysis is misguided. However, the Illinois statutory provisions on standing are independent of and do not need to refer to Federal due process cases, unless the majority is now holding that section 601(b)(2) is unconstitutional as applied to custody disputes such as the one in the case at bar. The majority opinion does not expressly hold that recognizing the Does' standing under section 601(b)(2) would violate Kirchner's due process rights, but instead concludes that the "procedural safeguards afforded fathers by the Adoption Act militate that fathers be placed in the same legal position after the vacation of an invalid adoption as they were in prior to the invalid adoption's approval." (Slip op. at 15.) By this statement, the majority apparently assumes that there cannot be a custody hearing following a failed adoption, without a finding of the biological father's unfitness. Moreover, in this case Kirchner's

legal position prior to the approval of the adoption was that of an unwed father who did not have custody. The child was a ward of the court in the temporary custody of the prospective adoptive parents.

In its analysis of the Does' standing under section 601(b)(2) of the Marriage Act, the majority begins by asserting that this court's decision of June 16, 1994, is "*res judicata* " as to the finding of this court that Kirchner had exhibited sufficient interest in his child within the first 30 days of his life. The majority then states that *res judicata* "precludes reconsideration of these conclusions in determining the outcome in the instant *habeas corpus* proceeding." (Slip op. at 13.) Despite such pronouncement, the majority repeatedly returns to its central rationale for finding that the Does lack standing, i.e., that the Does engaged in "deceit," "subterfuge," and the filing of "false pleadings under oath." It has never been suggested by anyone, in the trial court, including Kirchner or Daniella, that the Does' conduct was fraudulent, conspiratorial, or perjurious. Because the Does and their attorney were never charged with, or found guilty of, such grave misconduct in connection with the termination of Kirchner's rights in the adoption proceedings, and there is no evidence of record to support these irresponsible accusations, the majority's harsh criticisms cannot be bootstrapped into findings of fact made binding by *res judicata* principles.

***33** Without any evidence in the record, the majority attributes illegal and criminal conduct to the Does in order to support its ultimate conclusion regarding standing: "In simple terms, "Richard is in the Does' home without color of right." (Slip op. at 18.) The majority also holds that the Does do not have "physical custody" within the meaning of section 601(b)(2) of the Marriage Act, but retain bare "possession" of Richard. To explain the errors of law and logic contained in such conclusion an analysis of section 601(b)(2) and the cases that construe it is appropriate.

A. Standing Under Section 601(b)(2)

Various provisions of the Marriage Act permit interested parties to initiate or intervene in a child custody action, and to obtain a best-interests hearing, without the need to resort to *habeas corpus* procedure. (750 ILCS 5/601, 602 (West 1992).) However, like the cases decided under *habeas corpus* procedure, custody cases decided pursuant to section 601 of the Marriage Act require custody determinations to be based on the fundamental best-interests factors, which are codified in section 602. (*See, e.g.*, Ill.Ann.Stat.1980, ch. 40, par. 602, Historical & Practice Notes, at 17; *Cohn v. Scott* (1907), 231 Ill. 556; *Nye v. Nye* (1952), 411 Ill. 408.) Section 603 of the Act involves temporary custody procedures and section 610 governs the modification of custody based on changed circumstances. 750 ILCS 5/603, 610 (West 1992).

Section 601(b)(2) of the Marriage Act provides that "a child custody proceeding is commenced * * * by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents. (Emphasis added.)" (750 ILCS 5/601(b)(2) (West 1992).) The plain language of section 601(b)(2) reveals that the Does satisfy the literal requirements of the statute.

The phrase "physical custody," as used in section 601(b)(2), has been defined as requiring a determination of who is providing for the care, custody, and welfare of the child prior to the institution of custody proceedings. (*In re Marriage of Nicholas* (1988), 170 Ill.App.3d 171.) Physical custody "requires living with the child for an extended period of time. [Citation.]" (*In re Custody of Kulawiak* (1993), 256 Ill.App.3d 956, 962.) Clearly, Richard has never been in Kirchner's physical custody. Thus, the existence of the Does' standing is premised on the child's day-to-day living in their care and Kirchner's lack of physical custody.

Kirchner acknowledges that the Does appear to have standing under the plain terms of section 601(b)(2) because Richard is not in the "physical custody" of one of his biological parents. However, he argues that the case law requires, as a prerequisite to a nonparent's standing to maintain a custody suit, that the natural parent be shown to have voluntarily relinquished custody or control of the child. Because Kirchner never voluntarily relinquished such custody or control, he argues that the Does cannot establish their standing as a matter of law. The majority adopts Kirchner's argument on this point, and goes farther, by reducing the Does relationship with Richard to mere "possession." Such a construction of section 601(b)(2) is insupportable by reasoned analysis. In fact, the majority's view of the Does' standing assumes that the issue of Richard's custody depends on the same issue that was the subject of the fitness hearing in which Kirchner's paternal rights were terminated. However, as the cases discussed in the prior section of this dissent establish, the focus of a custody proceeding, whether brought pursuant to *habeas corpus* or pursuant to sections 601 and 602 of the Marriage Act, is not whether the natural parents' rights have been legally terminated or voluntarily relinquished. Rather, the sole determination for the court to decide in custody matters is what is best for the child.

***34** The key inquiry in the cases which have discussed the specific standing requirement of section 601(b)(2) is whether the child is in the "physical custody" of one of the natural parents when the suit is filed by the party seeking custody. (*e.g.*, *In re Custody of Peterson* (1986), 112 Ill.2d 48.) The question of whether a natural parent has physical custody of his or her child at the time the nonparent files for custody assumes that the natural parent had physical custody to begin with, or had been exercising care and control of the child, or at least enjoyed significant involvement in the minor's life. (*See Peterson*, 112 Ill.2d 48; *In re Custody of Menconi* (1983), 117 Ill.App.3d 394.) In the case at bar, the majority does not and cannot conclude that Richard is, or ever has been, in the physical custody, control, or possession of Kirchner.

Instead, Richard has at all times been in the lawful custody of the Does, and the fact that the adoption was invalidated does not alter that basic fact. When this court ruled that the Does' adoption of Richard had been improvidently granted. the Does' legal status as adoptive parents changed. However, their familial bonds with Richard did not change. Conversely, while the vacation of the adoption restored Kirchner's paternal right to develop a relationship with Richard, such ruling did not automatically vest in Kirchner the right to take immediate control and custody of Richard.

In holding that the Does lack standing because Kirchner did not voluntarily relinquish Richard, the majority relies on cases which are inapposite to the case at bar, particularly *In re Custody of Peterson* (1986), 112 Ill.2d 48. In *Peterson*, the maternal grandparents sought custody of their grandchild upon the death of the child's mother, who had been living in the.grandparents' home with the child. The grandparents' petition for custody asserted that the child was not in the "physical custody" of the father, who was divorced from the mother at the time of her death. The *Petersen* court rejected an interpretation of the statutory phrase "physical custody" that would have equated it with mere possession, noting that the statute was not intended to confer standing on persons who may file for custody based on bare, temporary possession of a child.

The *Petersen* court rejected the maternal grandparents' claim of standing, noting that the child was in the mother's custody, not the grandparents, at the time of the mother's death. Moreover, the child's father, who lived close by, had been regularly exercising his visitation rights during the mother's lifetime. The court noted that under such circumstances, "it; would not reasonably occur to the father that the maternal grandparents had physical custody of his child and were developing a position of standing, so that upon the death of his wife he could be deprived of his right to custody of his child." (*Peterson*, 112 Ill.2d at 54.) There had been no transfer of physical custody from the mother to the grandparents, and the

"fortuity" of the mother's death was the sole reason the grandparents could assert that the child was not in the father's physical custody at the time they filed their petition for custody pursuant to section 601(b)(2) of the Marriage Act.

*35 Unlike the case at bar, *Peterson* involved the rights of a divorced parent who had maintained his relationship with his child during the life of the mother, and who could not be deemed to have lost "physical custody" of the child, within the intent of section 601(b)(2), upon the custodial parent's death. The instant case involves significantly different facts, and the Does' standing is based on the reality that they have been the sole and legal custodians of Richard since four days after his birth. The majority's holding that the Does' lack standing because Kirchner did not voluntarily relinquish his paternal rights requires the majority to redefine the legislature's phrase "physical custody" and to distort the decisional law interpreting that phrase.

Two decisions cited with approval in *Petersen* illuminate the proper application of the standing requirement of section 601(b)(2): In re Custody of Barokas (1982), 109 Ill.App.3d 536 and *In re Custody of Menconi* (1983), 117 Ill.App.3d 394. In *Barokas*, the mother had placed her child in the temporary care of a family member, who later turned the child over to a third party who had often baby-sat the child as an overnight guest. This third party filed suit for custody on the basis that the child was not in the natural mother's physical custody at the time the suit for custody was initiated. The appellate court held that the mother had not intended to relinquish actual custody of the child within the meaning of the statute and therefore the third party lacked standing to maintain a custody action.

In *Menconi*, the court held that grandparents who sought custody of their grandchild did have standing to file for custody, notwithstanding the natural father's objections. The mother of the child had died shortly after the baby's birth and the father asked his parents to care for the baby. The grandparents took over the child's

care and the father visited only for short intervals. After 6 1/2 years, the father forcibly removed his child from the home of his parents, and refused to return the child. The court in *Menconi* held that the grandparents had standing to seek custody, even though the natural father, at the time the grandparents filed their custody petition, had physical "possession" of the child.

In *In re Marriage of Carey* (1989), 188 Ill.App.3d 1040, a stepmother was held to have standing to petition for custody of her stepchild upon the death of the father, notwithstanding the rights of the natural mother. The court found that the stepmother and child had developed a mother-son relationship during the years they had lived with the father. The court noted that although the natural mother had exercised her visitation rights, she had not provided for the care, custody, and welfare of the child in such manner that when the father died the court was required to find that physical custody of the child was in the natural mother. *See also Montgomery v. Roudez* (1987), 156 Ill.App.3d 262 (nonparent had standing to counter-sue for custody, pursuant to section 601(b)(2) of Marriage Act, in *habeas corpus* proceedings brought by unwed, teenaged mother who had signed equivalent of irrevocable consent to adoption).

***36** The above cases indicate that the standing requirement of section 601(b)(2) has not been not used as an artificial barrier to prevent genuine claims of custody by persons who have cared for the child on a daily basis in the role of parents. Rather, the statute prevents temporary caretakers, or persons living with the child's custodial parent, from asserting custodial rights in children who have been left in their care for limited periods of time. Therefore, the majority's expressed concern that a headmaster of a boarding school or the director of a children's summer camp might wrest custody from the natural parents under the guise of section 601(b)(2) is totally unfounded. The majority's conclusion that the Does have "even less authority" to seek standing than headmasters and camp directors is patently absurd. Slip. op at 18.

The standing requirement has been viewed as intended to protect both the custody rights of the natural parent and the environmental stability of the child, and therefore it has been observed that the determination of whether a "nonparent's" standing has been established depends on the particular facts involved. (*See Kulawiak*, 256 Ill.App.3d at 961 (there is "[n]o single fact or litmus test" which controls the finding of physical custody for purposes of standing); *In re Marriage of Santa Cruz* (1988), 172 Ill.App.3d 775, 783 (relevant facts include who has immediate physical possession of the child; how the person took over control; and the nature, manner, and duration of possession).) The Does acted in accordance with the law throughout these proceedings and they were not accused of or found guilty of fraud or collusion in the adoption court.[2] As to the nature, manner, and duration of their "possession" of Richard, clearly the Does have formed a strong familial relationship with him.

The majority acknowledges that the numerous appellate cases that have construed the standing requirement of section 601(b)(2) "have not always focused on voluntary relinquishment as the sole factor" but concludes that "an exhaustive review" of such cases discloses that "this custody provision has never been invoked to terminate parental rights absent some measure of voluntarily relinquishment." (Slip op. at 19.) Because custody hearings do

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[2] As noted above, no issue relating to the Does' conduct was presented in the hearing on the termination of Kirchner's rights, in the adoption proceeding. The circuit court did not find, or even suggest, that the Does colluded with Daniella to deceive Kirchner. At no time was there any suggestion that the Does should be held responsible for Kirchner's alleged inability to discover and assert his rights. The majority's unfounded charges are wholly devoid of support in the record and thus constitute an unconscionable indictment and conviction of the Does and their attorney.

not, and cannot, terminate all parental rights, the majority's reliance on the voluntary relinquishment concept is misplaced.

Although this court previously overturned the circuit court's factual determination and thereby vacated the adoption, it should be remembered that Kirchner's legal status at the time Daniella gave up the baby for adoption was that of an undisclosed sexual partner of the birth mother. The Kirchners were not then married and therefore there was no legal presumption that he was the father. The transcript of the hearing to terminate his paternal rights contains Kirchner's admission that Daniella never told him the baby died and that he did not believe her uncle's statement to that effect. Testimony of the uncle corroborates that Kirchner did not believe the baby had died. Even if he was unable to ascertain the baby's whereabouts initially after its birth on March 16, 1991, he admitted that he knew of the adoption by no later than May 12, 1991, when Daniella moved back into his apartment. His attorney did not file any pleading or legal document regarding Kirchner's paternity when the attorney filed his appearance form on June 6, 1991. The court-appointed guardian *ad litem* told the court he did not believe Kirchner's testimony of having been deceived was credible. He also expressed the opinion, based on the evidence, that the real reason Kirchner was seeking to prevent the adoption was because Daniella wanted to get the child back. The trial court ruled that the evidence established that Kirchner did not take sufficient steps to establish the necessary interest in the infant during the statutory 30-day period following the child's birth. As a result, that court terminated Kirchner's rights pursuant to Illinois adoption law. Consent to the adoption was not required by law. Although this court's vacation of the adoption changed Kirchner's legal status, and restored his paternal rights, it does not follow, in law or logic, that he was thereby retroactively vested with physical custody of Richard to defeat the standing of the Does.

***37** As noted, the majority's failure to recognize the Does' standing is largely premised upon its inaccurate view of the legal

effect of the failed adoption. In this court's prior opinion, we held only that Kirchner's legal right to prevent the adoption, through timely assertion of his rights as an unwed biological father, had been erroneously terminated. We did not hold, in our prior opinion, that custody of the child became legally vested in Kirchner, *nunc pro tunc*, as a result of the failed adoption. The effect of vacating a legally entered decree of adoption because a parent's rights were improperly terminated is entirely distinct from the issue of what hearing is necessary when the biological parent seeks to take over control and custody of a child who is living in his adoptive family's home at the time the court invalidates the adoption.

To blunt the argument that the Does have standing in the eyes of the law the majority implies that the adoption was "*void ab initio* " because it was obtained through lies, deceit, and subterfuge imputed to the Does. Thus, the majority attempts to bootstrap its conclusions by this highly unfair and extremely inaccurate characterization of the prior adoption proceedings. By casting the Does and their attorney as lawbreakers, the majority attempts to strip the Does of their legal standing to maintain a best-interests custody determination.

B. Adoption Act Amendments

The Does' standing to seek custody of Baby Richard is further recognized in the recent amendments to the Adoption Act (Pub. Act. 88--550, eff. July 3, 1994). This legislation was enacted while the Does' adoption case was pending before this court upon petition for rehearing. The amendments modify the Adoption Act to explicitly grant standing to nonbiological parents whose adoption request has been denied or vacated. In pertinent part, section 20 of the Adoption Act was amended to read as follows (the new language is shown in italics):

> "*Proceedings under this Act shall receive priority over other civil cases in being set for hearing. No matters not*

germane to the distinctive purpose of a proceeding under this Act shall be introduced by joinder, counterclaim or otherwise. An appeal from a judgment order for adoption or other appealable orders under this Act shall be prosecuted and heard on an expedited basis, unless good cause for doing otherwise is shown. In the event a judgment order for adoption is vacated or a petition for adoption is denied, the court shall promptly conduct a hearing as to the temporary and permanent custody of the minor child who is the subject of the proceedings pursuant to Part VI of the Illinois Marriage and Dissolution of Marriage Act. The parties to said proceedings shall be the petitioners to the adoption proceedings, the minor child, any biological parents whose parental rights have not been terminated, and any other parties who have been granted leave to intervene in the proceedings.

**38 This Act shall be liberally construed, and the rule that statutes in derogation of the common law must be strictly construed shall not apply to this Act. * * * This amendatory Act of 1994 applies to cases pending on and after its effective date." (Emphasis added.) Pub. Act 88-550, eff. July 3, 1994, adding 750 ILCS 50/20(b).*

The referenced part VI of the Illinois Marriage and Dissolution of Marriage Act provides in pertinent part that a nonparent may seek custody of a child when the child is not in the custody of a parent. 750 ILCS 5/601 et seq. (West 1992).

The amendments to the Adoption Act contain mandatory language reflecting the plain intent of the legislature, to provide for expedited custody hearings when adoptions petitions are denied or adoption judgments are vacated. Necessary parties to such proceedings are the petitioners in the adoption proceeding and any biological parent whose rights have not been terminated. These unambiguous provisions grant the Does direct standing to participate

in a hearing regarding Richard's custody. Therefore, unless the amendments do not apply or are held to be constitutionally infirm, Kirchner's challenge to the Does' standing in a custody hearing is wholly foreclosed.

The majority rules that the amendments "cannot be constitutionally applied retroactively" to the instant case. The majority posits that the amendments do not apply because they took effect after this court had "finally adjudicated" the parties' rights in the adoption case, on June 16, 1994. The amendments became effective on July 3, 1994. Although the Does' avenues of appeal had not been exhausted until well after July 3, the majority holds that, because the petitions for rehearing and petitions for writ of *certiorari* in the adoption case were denied, the effective date of the final judgment was June 16, 1994, the date on which this court entered judgment in the prior appeal.

This reasoning lacks merit and supporting authority. The appeal in the adoption case was not final, but was still pending, when the new enactments relating to custody hearing procedures following failed adoptions went into effect. With respect to when a case was "finally decided," for purposes of applying new legislation, this court has held, "Where the legislature changes the law pending an appeal, the case must be disposed of by the reviewing court under the law as it then exists, not as it was when the judgment was entered in the lower court." (*Bates v. Board of Education* (1990), 136 Ill.2d 260, 268- 69.) The court in *Bates* also held:

> "[A]n appeal is a continuation of the same case [citation] [and] it follows that until either the time to appeal has expired or, if an appeal is being pursued, until the court of review has rendered a decision, the judgment is not a final adjudication." *Bates*, 136 Ill.2d at 269.

Based on the *Bates* holding, the case involving the Does' adoption order was still pending on July 3, 1994, when the

amendments to the Adoption Act became effective. On that date, the Does' petition for rehearing was still pending, and the time in which to seek further review from the United States Supreme Court had not yet passed. Until rehearing was denied and the United States Supreme Court denied review by *certiorari*, the case was still "pending" in the courts and was not yet "final" for the purpose of applying the recent amendments to the Adoption Act. In addition, this court stayed its mandate in the instant case pending review by the United States Supreme Court. Unless and until the mandate issues, there is no final or enforceable judgment.

***39** The majority cites one case in support of its holding that "the filing of a petition for rehearing does not alter the effective date of the judgment of a reviewing court" if the petition is later denied. (*PSL Realty Co. v. Granite Investment Co.* (1981), 86 Ill.2d 291, 305.) However, *PSL Realty* has no application to the instant case. That case did not consider or decide the issue presented here, which is simply whether legislation that is enacted while an action is pending before this court on petition for rehearing may be applied to the case that is pending. The proper view of the issue before this court is that expressed in *Bates*, which held that a suit is still pending, for the purpose of applying recently enacted legislation, so long as the time for requesting appellate review has not yet been exhausted.

The rationale of *Bates* is also consistent with precedent of the United States Supreme Court, which has held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." (*Bradley v. Richmond School Board* (1974), 416 U.S. 696, 711, 40 L.Ed.2d 476, 488, 94 S.Ct. 2006; *see also United States v. Schooner Peggy* (1801), 5 U.S. (1 Cranch) 103, 2 L.Ed. 49.) These principles apply whether the intervening change in the law derives from a constitutional amendment, a statutory amendment, or a judicial decision by a court of greater authority. (*Bradley*, 416 U.S. at 715,

40 L.Ed.2d at 490, 94 S.Ct. at .) A judgment is "final," thus taking it beyond the effect of a change in the law, when the, availability of appeal' has been exhausted or has lapsed, and the time to petition for *certiorari* has passed." *Bradley*, 416 U.S. at 711 n. 14, 40 L.Ed.2d at 488 n. 14, 94 S.Ct. at ---, quoting *Linkletter v. Walker* (1965), 381 U.S. 618, 622 n. 5, 14 L.Ed.2d 601, —, 85 S.Ct. 1731.

In light of this precedent, the Does' appeal from the vacation of the adoption was still pending, and was not yet "final" when the amendments to the Adoption Act became effective. The majority does not refer to any of the above cases in its determination that the "retroactive" application of the Adoption Act amendments to the case at bar is constitutionally prohibited. Instead, the majority suggests that the application of the amendments would "alter the vested rights of the parties." (Slip op. at 21.) Again, the majority views the vacatur of the adoption on June 16, 1994, as the vesting of rights in Kirchner, who "had been improperly denied a most fundamental right, the right to the case, custody and control of his son." (Slip op. at 21.) Kirchener's "right" to custody of Richard could not have "vested" when this court's decision was announced last summer, since that ruling did not pertain to, consider, or decide custody of Richard.

The Illinois Attorney General filed a brief in this court, defending the constitutionality of the amendatory legislation. The Attorney General's argument is largely premised on the fact that the circuit court's application of the custody hearing procedures of the new amendments would not alter or reverse this court's opinion, which set aside the adoption. Instead, the amendments clarify the procedures that are to be followed after an adoption is vacated, which thereby obviates the need to rely on section 601(b)(2) or *habeas corpus* to commence a custody hearing. However, according to the majority, the "attempt to distinguish the vacation of the adoption of Richard from what happens after the vacation of the adoption" is meritless because the separation of powers analysis

"does not turn upon inconsequential distinctions. Earlier in this opinion, we noted that prior to the instant amendment, the vacation of an invalid adoption resulted in the automatic reversion of custody to any fit parent who has not otherwise relinquished his or her rights to the care, custody and control of the child." (Emphasis added.) Slip op. at 23.

*40 My research reveals no Illinois case, prior to the majority's instant opinion, which stands for the proposition that when an adoption is vacated, custody of a child "automatically reverts" to an unwed biological father who never had custody of the child in the first place. Indeed, all of the law I have reviewed is to the contrary. (*See, e.g., Sullivan v. People ex. rel Heeney* (1906), 224 Ill. 468, 477 ("it does not follow * * * from the invalidity of the [adoption] decree, that the relator is entitled to the custody of the child").) Any "automatic reversion" of custody following the vacation of the adoption was not in Kirchner, who never had custody, but to the guardian *ad litem*, whose court-appointed role was to represent Richard, who was, and is, a ward of the court. It was not until the majority granted the instant writ that Kirchner's right to immediate custody of Richard can be said to have vested by any order of this court. Before that date there was in effect a valid order of the circuit court, which granted temporary custody to the Does, to maintain the *status quo* pending the best-interests hearing.

A further consideration militates against the,argument that application of the Adoption Act amendments would violate principles of separation of powers. It is well established that the legislature may not enact a statute that dictates the resolution of facts in a pending action, but may enact legislation that "mandates which law the court is to apply to the facts in pending cases." (*Kujawinski v. Kujawinski* (1978), 71 Ill.2d 563, 570.) The amendments to the Adoption Act at issue here do not attempt to dictate any factual resolutions with respect to pending issues regarding whether the Does should retain custody of the child.

Rather, the purpose of the amendments is to clarify applicable legal principles, so that parents who have been granted adoption, but are divested of this adoption right on appeal, nevertheless retain standing to seek custody of the child. Although Illinois case law recognized the right of these nonbiological parents to seek custody after an adoption has been set aside, and section 601 of the Marriage Act may be construed to apply to such nonbiological parents, the enactments are important because they explicitly recognize and accord to such parents the statutory right of necessary party status under the Adoption Act. "Where, as here, an amendment is enacted soon after controversies have arisen regarding the statute [that was] amended, it is logical and reasonable to regard the amendment as a legislative interpretation of the original statute. [Citation.]" (*People v. Badoud* (1988), 122 Ill.2d 50, 56.) From this analysis it is apparent that the amendments to the Adoption Act, as applied to the instant cause, do no violence to principles of separation of powers. A strong presumption of constitutionality attaches to the General Assembly's laws, and the burden rests on the party who seeks to invalidate the statute. (*General Telephone Co. v. Johnson* (1984), 103 Ill.2d 363.) In the case at bar, Kirchner did not satisfy his burden, and the majority's efforts to aid him are unpersuasive.

IV. AWARDING THE WRIT OF *HABEAS CORPUS* "FORTHWITH" VIOLATED RICHARD'S CONSTITUTIONAL RIGHTS.

***41** This court found in its previous decision that Kirchner had, in effect, sufficiently grasped the opportunity to develop a relationship with Richard. (*Lehr v. Robertson*, (1983) 463 U.S. 248, 262, 77 L.Ed.2d 614, —, 103 S.Ct. 2985, —.) However, Kirchner's effort to "grasp the opportunity" to develop a relationship with Richard does not give Kirchner the right to summarily and arbitrarily deprive Richard of procedures provided to Richard under Illinois law which protect Richard's emotional and psychological relationship with the Does.

The majority's summary decision to grant Kirchner's petition for a writ of *habeas corpus* violates Richard's right to procedural due process under the fourteenth amendment of the United States Constitution. As noted previously, the issue of custody is different from the issues of adoption and the improper termination of parental rights. Unlike a termination of parental rights, which is concerned primarily with protecting the rights of parents, a change or modification of an existing custodial relationship is primarily concerned with protecting the child's interest in a healthy, stable environment. Under the Marriage Act and section 20 of the Adoption Act, the Illinois legislature created a constitutionally protected liberty interest in a child's emotional and psychological relationship with nonparent custodians, and has also provided the requisite procedures to prevent the summary or improper severing of this relationship in a way that would be harmful to the child. (750 ILCS 5/601(b)(2) (West 1992); Pub. Act 88-550 eff. July 3, 1994 (adding 750 ILCS 50/20(b)).) By ignoring the child custody procedures provided by the Marriage Act and section 20 of the Adoption Act, the majority has arbitrarily deprived Richard of due process under the law by disregarding the intent of the legislature.

On the issue of Richard's constitutional rights, the majority makes two erroneous assertions. First, that Richard has no constitutionally protected interest in his relationship with the Does. (Slip op. at 25.) Second, that although children "have a due process liberty interest in their family life, those interests are not independent of those of the child's natural parents absent a finding of unfitness." (Slip op. at 26.) On the first assertion, it is true that the Supreme Court has not yet "decided whether a child has a liberty interest symmetrical with that of a natural parent in maintaining his current relationship" (Slip op. at 24, citing *Michael H.*, 491 U.S. 110, 130, 491 L.Ed.2d 91, 110-11, 109 S.Ct. 2333.) However, this observation acknowledges only those constitutional protections that arise from fundamental rights. Under procedural due process, constitutional protection may arise from liberty interests created by State statute. (*Vitek v. Jones* (1980), 445 U.S.

480, 488, 63 L.Ed.2d 552, ---, 100 S.Ct. 1254, ---.) The State of Illinois has conferred upon Richard a liberty interest in his emotional and psychological relationship with the Does. The State cannot deprive Richard of this interest without following the procedures provided by State statute. On the second assertion, the majority has again confused the issues of the termination of parental rights and the determination of custody. In custody litigation, the interests of parents and children often diverge.

***42** While the Supreme Court long ago rejected the idea that a child is "the mere creature of the State" (*Pierce v. Society of Sisters* (1925), 268 U.S. 510, 535, 69 L.Ed. 1070, ---, 45 S.Ct. 571, ---), the State does have a substantial interest in providing minors with healthy and stable environments, an interest manifested in the wide variety of child welfare and child protection legislation. (*O'Connor v. Donaldson* (1975), 422 U.S. 563, 583, 45 L.Ed. 396, ---, 95 S.Ct. 2486, ("States are vested with the historic *parens patriae* power, including the duty to protect "persons under legal disabilities to act for themselves'"); *see also Prince v. Massachusetts* (1944), 321 U.S. 158, —, 88 L.Ed. 645, —, 64 S.Ct. 438, --- (States may impinge on parents' First Amendment rights to protect the well-being of children through the enforcement of child labor laws).) It was pursuant to the historic power of parens patriae that the State legislature passed the Marriage Act which requires that any child custody determination be in accord with the child's best interests. While the United States Supreme Court has found a substantive due process right in protecting family relationships against State interference (*see Pierce*, 268 U.S. 510, 69 L.Ed.2d 1070, —, 45 S.Ct. 571,–(parents' right to send children to private parochial schools); *Yoder v. Wisconsin* (1972), 406 U.S. 205, 32 L.Ed.2d 15, —, 92 S.Ct. 1526, (right to keep Amish children home after the eighth grade); *Moore v. East Cleveland* (1977), 431 U.S. 494, 52 L.Ed.2d 531, 97 S.Ct. 1932 (right of an extended family to live together); *Santosky v. Kramer* (1982), 455 U.S. 745, 71 L.Ed.2d 599, 102 S.Ct. 1388 (right to

higher burden of proof in order for the State to terminate parental rights)), all of these decisions rest on the presumption "that natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.* (1979), 442 U.S. 584, 602, 61 L.Ed. 101, ---, 99 S.Ct. 2493,

The legal presumption that parents will act in the best interests of their children fails in the context of a custody battle. Illinois has long rejected the idea that children are chattel, and has embraced the concept that custody should be adjudicated according to the child's best interest. (*Cohn v. Scott* (1907), 231 Ill. 556, 558 (stating that the welfare of the child is the paramount consideration to which the claims of all other persons must yield).) The Illinois legislature has recognized that custody battles, by their very nature, may force competing parties into a struggle that unnecessarily elevates the rights of the competing adult parties to the detriment of the child's interests. (*See* 750 ILCS 5/601(b)(2) (West 1992); Pub. Act 88-550 eff. July 3, 1994 (adding 750 ILCS 50/20(b)).) This is why in child custody litigation "a child of the parties to it becomes a ward of the court, and the court has the authority and the responsibility to act for the child's care, custody and support until it reaches majority. In discharging this responsibility the court's primary concern obviously is not the wishes of the parents but rather the best interests of the child." (*Sommer v. Borovic* (1977), 69 Ill.2d 220, 233 (citing *Kelly v. Kelly* (1925), 317 Ill. 104, 110, and *McDonald v. McDonald* (1973), 13 Ill.App.3d 87, 90); *see also In re Custody of Menconi* (1983), 117 Ill.App.3d 394 (noting that the superior rights doctrine and the policy of fostering a stable home environment were in direct conflict).) When Daniella terminated her parental rights four days after Richard's birth, she effectively placed Richard in the care of the State of Illinois, and he became a ward of the State. The State now has the duty to care for Richard's health and emotional stability. In the present case, where two parties are competing for the custody of a child, Illinois law properly recognizes that the interests of the adult parties may conflict with the interests of the child. Therefore, custody is

properly adjudicated in accordance with the child's best interests rather than the interests of the competing adults. 750 ILCS 5/602 (West 1992).

*43 The United States Supreme Court recognizes that "minors, as well as adults, are protected by the Constitution and possess constitutional rights" (*Planned Parenthood v. Danforth* (1976), 428 U.S. 52, 73, 49 L.Ed.2d 788, 96 S.Ct. 2831, —.) Further, the Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." (*Vitek*, 445 U.S. at 488, 63 L.Ed.2d at —, 100 S.Ct. at —; *see also Wolff v. McDonnell* (1974), 418 U.S. 539, 557, 33 L.Ed.2d 548, —, 92 S.Ct. 2701, — (due process mandates the provision of procedures to prevent the arbitrary deprivation of a right created by State statute).) In order for a statute to grant a person a protected liberty interest, the person must "have a legitimate claim of entitlement" to the liberty interest. (*Greenholtz v. Inmates of Nebraska Penal & Correctional Complex* (1979), 442 U.S. 1, 7, 60 L.Ed.2d 668, —, 99 S.Ct. 2100, —, quoting *Board of Regents v. Roth* (1972), 408 U.S. 564, 577, 33 L.Ed.2d 548, —, 92 S.Ct. 2701, —.) A liberty interest created by statute includes the right to the requisite procedures necessary to protect that liberty interest. (*Connecticut Board of Pardons v. Dumschat* (1981), 452 U.S. 458, 463, 69 L.Ed.2d 158, —, 101 S.Ct. 2460, —, citing *Wolff*, 418 U.S. at 557, 33 L.Ed.2d at —, 92 S.Ct. at —.) The extent of constitutional due process protection is not limited to the protection of fundamental rights. Therefore, as our Supreme Court has ruled, "a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff*, 418 U.S. at 558, 33 L.Ed.2d at —, 92 S.Ct. at —.

In the instant case, the majority has arbitrarily deprived Richard of his statutory right to have his custody determined in a

best-interests hearing. Under Illinois law, section 602 of the Marriage Act grants Richard the "legitimate claim of entitlement" to have his custody determined in a hearing "in accordance with [his] best interest." (750 ILCS 5/602(a) (West 1992).) In section 602, the Illinois legislature created a constitutionally protected liberty interest in a child's emotional and psychological relationship with the child's nonparent lawful custodians. Richard's due process liberty interest is the statutory right to have any change in his custody adjudicated in a hearing in accord with his "best interests." In a custody hearing, the trial court has broad discretion to tailor custody arrangements to a wide variety of circumstances and modify custody orders. (*See* 750 ILCS 5/603 (temporary orders); 610 (modification) (West 1992).) Under the Marriage Act and section 20 of the Adoption Act, a best-interests hearing takes place whenever there is a change or modification of custody. A child's right to a best-interests custody hearing is a procedure necessary to protect the child's relationship with his third party legal custodians against summary and arbitrary termination. In protecting Richard's relationship with the Does, the State protects Richard's emotional and psychological well-being.

***44** The granting of Kirchner's writ of *habeas corpus* effectively extinguished Richard's opportunity to receive a best-interests custody hearing. The trial court has jurisdiction under the Marriage Act and section 20 of the Adoption Act to adjudicate Richard's custody. The trial court is also the proper forum to conduct a fact finding hearing that would result in a custody determination in accord with Richard's best interests. Since this court found that Kirchner was a fit parent and that Kirchner's parental rights were improperly terminated, a valid adoption of Richard by the Does cannot be granted absent Kirchner's voluntary termination of his parental rights. As correctly pointed out in our previous decision between these parties, the proper termination of parental rights is the necessary prerequisite to granting a valid adoption.

However, in a custody dispute, the best interest of the child is of paramount importance. In dispensing with a custody hearing, the majority has placed the emotional and psychological well-being of a small child in danger. (Goldstein, Freud, & Solnit, *Beyond the Best Interests of the Child* (1973) (when a child is removed from his or her home, the child's emotional ties to his or her parents are disrupted and the child will likely be traumatized).) One of the purposes of a custody hearing is to provide for an orderly change or modification in custody without exposing the child to risk of undue harm. At such a custody hearing, Kirchner's important rights will be considered along with the other relevant factors. The granting of the writ of *habeas corpus* to Kirchner, as the majority has done, ignores the State's valid interest in the psychological and emotional health of its children and unconstitutionally deprives Richard of a best-interests custody hearing, granted to him by the Illinois legislature.

V. THE RIGHT TO A CUSTODY HEARING PROVIDED FOR IN THE MARRIAGE ACT AND THE ADOPTION ACT DOES NOT IMPINGE ON KIRCHNER'S CONSTITUTIONAL RIGHT AGAINST STATE INTERFERENCE.

The majority rejects long-standing Illinois law and replaces it with a determination that a biological father is entitled to automatic and exclusive custody of a child after the vacation of an adoption order. To support its conclusion, the majority declares unconstitutional the holding in *Giacopelli*, 16 Ill.2d 556 (biological parent's superior right to custody of child must be subordinated to best interests of child in a custody determination).

In declaring *Giacopelli* unconstitutional, the majority, at pages 10 and 26 of its opinion, relies upon Justice Stewart's concurrence in *Smith v. Organization of Foster Families for Equality and Reform* in which he stated:

> "If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the

> sole reason that to do so was thought to be in the children's best interest, * * * [this] would have intruded impermissibly on the private realm of family life which the state cannot enter." Smith (1977), 431 U.S. 816, 862-63, 53 L.Ed.2d 14, 46, 97 S.Ct. 2094, 2119 (Stewart, J., concurring in the judgment, joined by Burger, C.J., and Rehnquist, J.)

***45** *See also Quilloin v. Walcott* (1978), 434 U.S. 246, 255, 54 L.Ed.2d 511, 520, 98 S.Ct. 549, 555.

In *Smith*, the United States Supreme Court addressed the due process claims of a group of foster parents who sought additional procedural protection before the state could remove children who had been in the care of the foster parents for a year or more. In searching for the proper level of constitutional protection available to familial relationships, the *Smith* Court sought to define the family in constitutional terms. (*Smith*, 431 U.S. at 842-44, 53 L.Ed.2d at ---, 97 S.Ct. at ---.) According to the *Smith* Court, the "natural" family, which is accorded the greatest constitutional protection against state interference, is composed of three basic elements: first, the biological relationship between parent and child *Smith*, 431 U.S. at 843, 53 L.Ed.2d at 97 S.Ct. at ---, citing *Stanley v. Illinois* (1972), 405 U.S. 645, 651, 31 L.Ed.2d 551, ---, 92 S.Ct. 1208, ---); second, the marriage relationship (*Smith*, 431 U.S. at 843-44, 53 L.Ed. at ---, 97 S.Ct. at ---, citing *Griswold v. Connecticut* (1965), 381 U.S. 479, 486, 14 L.Ed. 510, ---, 85 S.Ct. 1678, ---); and third, the emotional and psychological attachment involved in the daily activities of raising a child (*Smith*, 431 U.S. at 844, 53 L.Ed. at ---, citing *Yoder v. Wisconsin* (1972), 406 U.S. 205, 231-33, 32 L.Ed.2d 15, 92 S.Ct. 1526, ---).

Neither the Does nor Kirchner fit the *Smith* Court's definition of a "natural family." The Does clearly have a marital relationship and the emotional and psychological attachment to Richard. Yet, the Does lack a biological connection with Richard and, after the vacation of the adoption, the Does only legal relationship with

Richard is custodial. However, Kirchner is further removed from the *Smith* "natural family" definition than the Does. Kirchner has only a biological connection with Richard and lacks any emotional or psychological ties. Kirchner was not present at the time of Richard's birth. While Kirchner and Daniella are currently married, they were not married when the baby was born. Further, Daniella voluntarily terminated her parental rights four days after Richard's birth. In the eyes of the law, Daniella's interests are irrelevant. By voluntarily executing the irrevocable termination of her parental rights, Daniella effectively gave up Richard for adoption when he was only four days old. The State of Illinois then had the duty to ensure proper care for the four-day old baby. The State fulfilled its duty by making Richard a ward of the court, and granting temporary legal custody to suitable caretakers such as the Does. The Does' relationship with Richard more closely meets the United States Supreme Court's definition of a natural family than Kirchner's strictly biological relationship.

By giving the constitutional protections afforded to a "natural" or "unitary" family to Kirchner, the majority has clouded the central question: Do the custody interests identified in the Marriage Act and the Adoption Act to prevent the summary, arbitrary or wrongful termination of Richard's emotional and psychological ties to the Does unconstitutionally impinge on the rights of Kirchner, the unwed, noncustodial, biological father who lacks any emotional or psychological ties to his offspring? A study of the five cases in which the U.S. Supreme Court has addressed the constitutional rights of unwed biological fathers indicates that Kirchner's rights as a biological father are not impinged upon by the allowance of the custody hearings sanctioned in the Marriage Act and the Adoption Act. *Michael H. v. Gerald D.* (1989), 491 U.S. 110, 105 L.Ed.2d 91, 109 S.Ct. 2333; *Lehr v. Robertson* (1983), 463 U.S. 248, 77 L.Ed.2d 614, 103 S.Ct. 2985; *Caban v. Mohammed* (1979), 441 U.S. 380, 60 L.Ed.2d 297, 99 S.Ct. 1760; *Quilloin v. Walcott* (1978), 434 U.S. 246; *Stanley v. Illinois* (1972), 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208.

***46** Contrary to the majority's assertion, *Michael H.*, *Lehr*, *Caban*, *Quilloin*, and *Stanley*, do not stand for the proposition that under our Constitution custody of a child may never be granted to a third party absent a finding that the biological parent is unfit. The Supreme Court in *Lehr v. Robertson* best summarized the constitutional rights of unwed biological fathers in relationships with their children. After a detailed examination of *Caban*, *Quilloin* and *Stanley*, the Court ruled:

> " Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.'" [*Caban*, 441 U.S. at 397, 60 L.Ed.2d at 310, 99 S.Ct. at 1770 (Stewart, J., dissenting).]
>
> * * *
>
> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." (Emphasis in original.) (*Lehr*, 463 U.S. at 260, 262, 77 L.Ed.2d at 626, 627, 103 S.Ct. at 2992, 2993-94.)

The *Lehr* Court also emphasized that an unwed father's most effective means to protect his parental rights with his children is to marry the mother of the children. *Lehr*, 463 U.S. at 263; *see also Michael H. v. Gerald D.*, 491 U.S. 110.

Unlike the issues before this court at this time, *Caban*, *Quilloin*, *Lehr*, and *Michael H.* involved the complete and irrevocable termination of parental rights of an unwed father and

not a custody determination. *Caban*, *Quilloin*, and *Lehr* all involved the complete termination of parental rights of an unwed biological father when the mother had married, and the mother's husband was attempting to adopt the child. The Court found in *Michael H.* that a statute which severely limited the rights of an unwed, biological father to challenge the legitimacy of a child born into an existing marriage was constitutional. (*Michael H.*, 491 U.S. 110.) Only *Stanley* involved a custody determination. An unwed father's right to a hearing in a custody determination is the extent of Kirchner's due process rights under *Stanley*. (*Stanley*, 405 U.S. 645.) Both the Marriage Act and the Adoption Act grant Kirchner the right to seek custody of Richard in a best-interests custody hearing.

The majority asserts that the rationale underlying the these five Supreme Court opinions entitles Kirchner to the highest degree of constitutional protection available to an unwed biological father because of the alleged deceit in the termination of Kirchner's parental rights. (Slip op. at 14, 15.) This assertion is unfounded. The majority fails to understand that the Supreme Court, in these opinions, has afforded a biological father a high degree of due process protection to prevent improper termination of his parental rights. (*See Caban*, 441 U.S. 380; *Santosky v. Kramer* (1982), 455 U.S. 745, 71 L.Ed.2d 599, 102 S.Ct. 1388.) These opinions do not afford the same protection to a biological father in a custody proceeding. Kirchner's parental rights were afforded complete protection under due process pursuant to *In re Petition of Doe* (1994), 159 Ill.2d 347, which reinstated Kirchner's improperly terminated parental rights. On the issue of Kirchner's improperly terminated rights, his due process rights have been vindicated. However, neither the United States Constitution nor Illinois law automatically vest custody in a noncustodial, biological father following the recognition of his parental rights. In sum, although Kirchner's right to develop a psychological father-son relationship was vindicated in the prior appeal, the State does not unconstitutionally impinge on that right by limiting or overseeing the way

in which this relationship will develop under the circumstances of this case. That is the purpose of a custody determination. Custody will only be granted after a hearing on the child's best interests.

CONCLUSION

*47 In defiance of established Illinois law and the constitutional rights of a small child under this law, the majority has given Kirchner the power to summarily terminate the only family relationship that Richard has ever known. By its denial of the rights established in the Federal and State Constitutions, and Illinois statutory and case law, the majority has denied Richard and the Does a custody hearing at which the best interests of the child would be considered. Instead, by the insupportable issuance of the writ forthwith, the court has permitted a biological father who has never seen the four-year-old child the unqualified right to remove the child from his home and family, without any court determination or oversight of the best interests of the child. I cannot countenance such a result, or concur in a decision which recognizes only the rights of the biological parent and which totally ignores the rights of the child and the Does, who cared for him since he was four days old.

In denying Richard the protections the State has provided him, the majority places more importance on biology than on the importance of the nurturing, caring, and loving involved in raising a child. Illinois has always made the, welfare of children the concern paramount to all other concerns in custody disputes. The majority calls this policy a "remnant of a bygone era." (Slip op. at 10.) Because I believe this policy, deeply rooted in Illinois law, has progressed, and should progress, with the development of the law rather than be eradicated with the passage of time, I cannot concur in the majority's regressive holding.

Hopefully, someday children will be given their due process rights under the law, and also be given the same guarantees of their rights as are given to all other citizens. In its wisdom, this court

should have examined its thinking, not only in the light of statutes and precedent, but also in the light of reality and human consequences. In both lights this court has failed Baby Richard. Accordingly, I dissent.

No. 78101

IN THE
SUPREME COURT OF ILLINOIS

Otakar Kirchner,	)	
	)	
Petitioner	)	
	)	
v.	)	Writ of
	)	Habeas Corpus
John Doe and Jane Doe,	)	
	)	
Respondents	)	
	)	
Hon. Roland W. Burris, Attorney General of the State of Illinois,	)	
	)	
Intervenor-Respondent	)	

ORDER

The petition for writ of habeas corpus is allowed. Writ of habeas corpus is awarded and shall issue forthwith. Mandate to issue forthwith.

Opinion and/or dissent(s) to follow.

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of January, 1995.

Present: Michael A. Bilandic, Chief Justice
Justice Benjamin K. Miller
Justice James D. Heiple
Justice Charles E. Freeman
Justice Moses W. Harrison II
Justice Mary Ann G. McMorrow
Justice John L. Nickels

On the twenty-fifth day of January, 1995, the Supreme Court entered the following judgment:

No. 78101

Otakar Kirchner,

Petitioner

Writ of
Habeas Corpus

v.

John Doe and Jane Doe,

Respondents

Hon. Roland W. Burris, Attorney General of the State of Illinois,

Intervenor-Respondent

The petition for writ of habeas corpus is allowed. Writ of habeas corpus is awarded and shall issue forthwith. Mandate to issue forthwith.

Opinion and/or dissent(s) to follow.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this twenty-fifth day of January, 1995.

/s/ Juleann Hornyak Clerk,
Supreme Court of the State of Illinois

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of January, 1995.

Present: Michael A. Bilandic, Chief Justice
Justice Benjamin K. Miller
Justice James D. Heiple
Justice Charles E. Freeman
Justice Moses W. Harrison II
Justice Mary Ann G. McMorrow
Justice John L. Nickels

No. 78101

Otakar Kirchner,

Petitioner

v.

John Doe and Jane Doe,

Respondents

Hon. Roland W. Burris, Attorney General of the State of Illinois,

Intervenor-Respondent

WRIT OF HABEAS CORPUS

TO: Respondents John Doe and Jane Doe

You are hereby ordered and directed to surrender forthwith custody of the child known as Baby Boy Richard, also known as Baby Boy Janikova, to Petitioner Otakar Kirchner.

As Clerk of the Supreme Court of the State of Illinois keeper of the records, files and Seal thereof, I certify that the foregoing is the writ of habeas corpus in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this twenty-fifth day of January, 1995.

/s/ Juleann Hornyak Clerk,
Supreme Court of the State of Illinois

638 N.E.2d 181
159 Ill. 2d 347

In re Petition of John DOE and Jane Doe, Husband and Wife, to Adopt Baby Boy Janikova (John Doe et al., Appellees; Otakar Kirchner, Appellant).

No. 76063.

Supreme Court of Illinois.

June 16, 1994.

Rehearing Denied July 12, 1994.

Supplemental Opinions on Denial

of Rehearing July 12, 1994.

Certiorari Denied Nov. 7, 1994.

See 115 S. Ct. 499.

Adoptive parents filed petition to adopt newborn baby boy; father contested adoption. The Circuit Court, Cook County, Eugene Wachowski, J., ruled that father's consent to adoption was unnecessary, and the Appellate Court affirmed, 254 Ill.App.3d 405, 194 Ill. Dec. 311, 627 N.E.2d 648. Leave to appeal was granted. The Supreme Court, Heiple, J., held that there was insufficient evidence that father had not shown reasonable degree of interest in child within first 30 days of his birth, and therefore father's consent to adoption was not unnecessary under Adoption Act.

Appellate Court reversed; circuit court reversed.

McMorrow, J., filed concurring opinion in which Miller and Freeman, JJ., joined.

Heiple, J., filed opinion in support of denial of rehearing.

Freeman, J., filed opinion in support of denial of rehearing.

McMorrow, J., dissented from denial of rehearing and filed opinion in which Miller, J., joined.

ADOPTION k7.8(4)

There was insufficient evidence that father had not shown reasonable degree of interest in child within 30 days of his birth, and therefore father's consent to adoption was not unnecessary under Adoption Act; mother, who gave birth while father was out of the country, frustrated father's attempts to locate child, telling him initially that child had died, and adoptive parents and their attorney failed to make any effort to ascertain name or address of father despite fact that mother indicated she knew who he was. S.H.A. 750 ILCS 50/1, 8.

****181 ***535 *348** Loren L. Heinemann, Orland Park, for appellant.

Richard A. Lifshitz, Carolyn E. Winter and R. Peter Carey, Mandel, Lipton & Stevenson Ltd., Chicago, for appellees.

Edward J. O'Connell, guardian ad litem, and Patrick T. Murphy, Kass A. Plain, Lee Ann Lowder and Mary Kenney, Office of the Cook County Public Guardian, Chicago, for Baby Boy Janikova.

Bruce A. Boyer, Annette Ruth Appell and Zelda B. Harris, Chicago, for *amicus curiae*, Children & Family Justice Center of Northwestern University Legal Clinic.

Diane L. Redleaf, and Amy Zimmerman, Chicago, for *amicus curiae*, Legal Assistance Foundation of Chicago.

William E. Rattner and Kathleen Burch, Hopkins & Sutter, Chicago, for *amicus curiae*, Juvenile Protection.

Suellyn Scarnecchia, Ann Arbor, MI (Anne C. Auten, Kristen A. Donaghue, Keri Goldstein, Lara A. V. Hutner, Kacy Kleinhans, David A. Schwartz and ***349** Gregory J. Stanton, law students), for *amicus curiae*, Child Advocacy Law Clinic.

Joshua Mark Zucker, Chicago, for *amicus curiae*, Yale University Child Study.

Wyvonia Ford Bridgeforth, Oak Park, for *amicus curiae*, Legal Action Project.

Justice HEIPLE delivered the opinion of the court:

John and Jane Doe filed a petition to adopt a newborn baby boy. The baby's biological mother, Daniella Janikova, executed a consent to have the baby adopted four days after his birth without informing his biological father, Otakar Kirchner, to whom she was not yet married.

The mother told the father that the baby had died, and he did not find out otherwise ****182 ***536** until 57 days after the birth. The trial court ruled that the father's consent was unnecessary because he did not show sufficient interest in the child during the first 30 days of the child's life. The appellate court affirmed with one justice dissenting. (254 Ill.App.3d 405, 194 Ill.Dec. 311, 627 N.E.2d 648.) We granted leave to appeal (134 Ill.2d R. 315) and now reverse.

Otakar and Daniella began living together in the fall of 1989, and Daniella became pregnant in June of 1990. For the first eight months of her pregnancy, Otakar provided for all of her expenses.

In late January 1991, Otakar went to his native Czechoslovakia to attend to his gravely ill grandmother for two weeks. During this time, Daniella received a phone call from Otakar's aunt saying that Otakar had resumed a former romantic relationship with another woman.

Because of this unsettling news, Daniella left their shared apartment, refused to talk with Otakar on his return, and gave birth to the child at a different hospital than where they had originally planned. She gave her consent to the adoption of the child by the Does, telling ***350** them and their attorney that she knew who the father was but would not furnish his name. Daniella and her uncle warded off Otakar's persistent inquiries about the child by telling him that the child had died shortly after birth.

Otakar found out that the child was alive and had been placed for adoption 57 days after the child was born. He then began the instant proceedings by filing an appearance contesting the Does' adoption of his son. As already noted, the trial court ruled that Otakar was an unfit parent under section 1 of the Adoption Act (the Act) (750 ILCS 50/1 (West 1992)) because he had not shown a reasonable degree of interest in the child within the first 30 days of his life. Therefore, the father's consent was unnecessary under section 8 of the Act (750 ILCS 50/8 (West 1992)).

The finding that the father had not shown a reasonable degree of interest in the child is not supported by the evidence. In fact, he made various attempts to locate the child, all of which were either frustrated or blocked by the actions of the mother. Further, the mother was aided by the attorney for the adoptive parents, who failed to make any effort to ascertain the name or address of the father despite the fact that the mother indicated she knew who he was. Under the circumstances, the father had no opportunity to discharge any familial duty.

In the opinion below, the appellate court, wholly missing the threshold issue in this case, dwelt on the best interests of the child. Since, however, the father's parental interest was improperly terminated, there was no occasion to reach the factor of the child's best interests. That point should never have been reached and need never have been discussed.

Unfortunately, over three years have elapsed since the birth of the baby who is the subject of these ***351** proceedings. To the extent that it is relevant to assign fault in this case, the fault here lies initially with the mother, who fraudulently tried to deprive the father of his rights, and secondly, with the adoptive parents and their attorney, who proceeded with the adoption when they knew that a real father was out there who had been denied knowledge of his baby's existence. When the father entered his appearance in the adoption proceedings 57 days after the baby's birth and demanded his rights as a father, the petitioners should have relinquished the

baby at that time. It was their decision to prolong this litigation through a lengthy, and ultimately fruitless, appeal.

The adoption laws of Illinois are neither complex nor difficult of application. Those laws intentionally place the burden of proof on the adoptive parents in establishing both the relinquishment and/or unfitness of the natural parents and, coincidentally, the fitness and the right to adopt of the adoptive parents. In addition, Illinois law requires a good-faith effort to notify the natural parents of the adoption proceedings. These laws are designed to protect natural parents in their preemptive rights to their own children wholly apart from any consideration of the so-called best interests of the child. If it were otherwise, few parents would be secure in the custody of their own children. If best **183 ***537 interests of the child were a sufficient qualification to determine child custody, anyone with superior income, intelligence, education, etc., might challenge and deprive the parents of their right to their own children. The law is otherwise and was not complied with in this case.

Accordingly, we reverse.

Appellate court reversed; circuit court reversed.

*352 Justice McMORROW, concurring:

I agree with the majority's reversal of the trial court's termination of the respondent's parental rights with respect to his son. However, I believe that the importance of the issues presented in this appeal warrants a more comprehensive analysis than that offered by the majority. Consequently, I write separately to state in greater detail the reasons for my conclusion that the decisions of the trial court and the appellate court were in error.

The facts of this case are set forth in detail in the appellate court proceeding (254 Ill.App.3d 405, 194 Ill.Dec. 311, 627 N.E.2d 648) and need not be restated in full at this juncture. The appellate court addressed two issues that are raised in this appeal. As considered by the appellate court, the first issue involves

whether the perceived "best interests" of the child to remain with his adoptive parents outweighed any consideration of the parental fitness of the respondent. The second question addressed by the appellate court is whether the trial court properly found that respondent was an unfit father under the Adoption Act (750 ILCS 50/1(D)(l) (West 1992)).

I consider each of these issues seriatim.

I

The appellate court held that the respondent's parental rights could lawfully be abrogated, without regard to whether the respondent is unfit, where the court perceives that such termination of parental rights would be "in the best interest of the child." (See 254 Ill.App.3d at 410-14, 194 Ill.Dec. 311, 627 N.E.2d 648.) As a result, the appellate court found that the child's "best interests" could override any consideration of the respondent's parental fitness.

To justify its conclusion, the appellate court in the present case found it significant that the Illinois legislature has declared in the Adoption Act that the "best interests and welfare of the person to be adopted shall be of paramount consideration in the construction *353 and interpretation of this Act." (750 ILCS 50/20a (West 1992).) I do not believe that this broad policy statement justifies the appellate court's holding.

Notwithstanding this statement of policy, the Adoption Act nevertheless specifically requires that a parent who does not consent to adoption must be found unfit before parental rights may be terminated. (750 ILCS 50/8(a)(1) (West 1992); see also 750 ILCS 50/8(a)(3), (a)(4) (West 1992) (where child is born out of wedlock and is placed for adoption within six months from birth, consent of child's father is not required, if he was informed that he was the father, and if he failed to undertake acts, as specified in the statute, to show that he has a bona fide parental interest in child (e.g., openly living with child, holding himself out as father of child,

paying for medical expenses, or visiting with child)).) The Act does not specify, however, that the court may disregard parental fitness when the child is a newborn.

This court has previously held that a broad statement of policy does not authorize the court to act in contravention to or beyond the scope of the specific requirements of a statute. (*See In re M.M.* (1993), 156 Ill.2d 53, 67, 189 Ill.Dec. 1, 619 N.E.2d 702 ("liberal construction" and "best interests" under Juvenile Court Act do not confer on trial court the authority to condition guardian's power to consent to adoption).) As a result, the broad statement of policy in the Adoption Act does not support the appellate court's ruling in the instant cause.

In addition, the appellate court's holding is at odds with this court's analysis in *In re Adoption of Syck* (1990), 138 Ill.2d 255, 149 Ill.Dec. 710, 562 N.E.2d 174. In *Syck*, this court reviewed a trial court's determination that the biological mother had not expressed reasonable concern, interest or responsibility ****184 ***538** for her son, and that the mother was therefore an unfit parent under section 1(D)(b) of the Adoption Act. Under section 1(D)(b), a parent is unfit ***354** when he or she has failed to "maintain a reasonable degree of interest, concern or responsibility as to the child's welfare." (750 ILCS 50/1(D)(b) (West 1992).) The language in section 1(D)(b) is very similar to section 1(D)(1), at issue in the present cause, regarding a failure to demonstrate reasonable interest in, concern for, or responsibility for a newborn child (see 750 ILCS 50/1(D)(1) (West 1992) (parent unfit where parent "fail[ed] to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth")).

In *Syck*, this court held that, where it is alleged that the biological parent is unfit because of a failure to show a reasonable degree of interest in, concern, or responsibility for the child, the court must determine the parent's unfitness before the court can proceed to a consideration of the child's "best interests:" "When

ruling on parental unfitness, a court is not to consider the child's best interests.' [Citations.] At this point, it is the parent's past conduct in the then-existing circumstances that is under scrutiny. [Citations.] The child's welfare and whether the child's eventual adoption by the petitioners would improve his future financial, social, and emotional atmosphere is not relevant in judging the fitness of the natural parent [citations]; nor are these factors relevant in determining, as in this case, whether, in the past, the natural parent maintained a reasonable degree of concern, interest and responsibility as to the child's welfare. Only after a parent is found, by clear and convincing evidence, to be unfit does a circuit court ruling on an adoption petition proceed to consider the child's best interests and whether those interests would be served by the child's adoption by the petitioners, requiring termination of the natural parent's parental rights. [Citations.]" *Syck*, 138 Ill.2d at 276-77, 149 Ill.Dec. 710, 562 N.E.2d 174.

The appellate court in the instant cause proposed that *Syck* was "distinguishable and not controlling." (254 Ill.App.3d at 411 n. 2, 194 Ill.Dec. 311, 627 N.E.2d 648.) The court noted that in *Syck*, "there was no judgment of adoption entered; the ***355** child was not a newborn, but rather was eight years old; the issue of unfitness did not relate to the first 30 days after the child's birth, as does the present case; and the issue of unfitness involved section 1(D)(b) of the Adoption Act [citation], rather than section 1(D)(1) [citation]." 254 Ill.App.3d at 411 n. 2, 194 Ill.Dec. 311, 627 N.E.2d 648.

These circumstances are insufficient to deviate from this court's determination in *Syck* that the child's "best interests" cannot justify termination of parental rights where the parent has not been found unfit. The rule expressed by this court in *Syck* has been applied in numerous court decisions (*In re S.J.* (1992), 233 Ill.App.3d 88, 121, 174 Ill.Dec. 259, 598 N.E.2d 456; *In re Adoption of D.A.* (1991), 222 Ill.App.3d 73, 75, 164 Ill.Dec. 696, 583 N.E.2d 612; *In re A.H.* (1991), 215 Ill.App.3d 522, 530- 31, 159 Ill.Dec. 32,

575 N.E.2d 261; *In re B.T.* (1990), 204 Ill.App.3d 277, 281, 149 Ill.Dec. 573, 561 N.E.2d 1269; *Perkins v. Breitbarth* (1981), 99 Ill.App.3d 135, 139, 54 Ill.Dec. 458, 424 N.E.2d 1361; *In re Adoption of Burton* (1976), 43 Ill.App.3d 294, 301, 1 Ill.Dec. 946, 356 N.E.2d 1279), including a proceeding where it was alleged that the parent was unfit under section 1(D)(1) of the Act. (*In re Adoption of J.R.G.* (1993), 247 Ill.App.3d 104, 110, 187 Ill.Dec. 169, 617 N.E.2d 377.) This court's holding in *Syck* reflected the express requirements of our Adoption Act, as explained more fully above, that parental rights generally cannot be terminated unless the parent has been proven unfit. (See 750 ILCS 50/8(a) (West 1992).) In my judgment, *Syck* is both controlling and persuasive authority in the present cause.

The appellate court also relied on certain State and Federal statutory provisions. (705 ILCS 405/2-14 (West 1992) (Juvenile Court Act of 1987); 42 U.S.C. s 675(5)(C) (1988) (Adoption Assistance & Child Welfare Act).) The court "extrapolate[d] and infer[red]" from these provisions that "after a newborn **185 ***539 child has been placed for adoption and lives continuously thereafter for longer than 18 months with his adopting parents who adopt or have adopted him pursuant to a judgment of adoption, it would be contrary to the best interest of the child to *356 remove him from his home and family by disturbing the judgment of adoption." 254 Ill.App.3d at 413, 194 Ill.Dec. 311, 627 N.E.2d 648.

I cannot agree with the appellate court's "extrapolations" from these statutes. The appellate court *sua sponte* created an irrebuttable, *per se* presumption that, once a newborn child has lived with adoptive parents for at least 18 months, the child's living arrangements cannot be modified. However, the statutory provisions cited by the appellate court pertain to prompt judicial disposition and review where foster care has been requested or ordered because of child abuse, neglect, or dependency. (705 ILCS 405/2-14 (West 1992) (Juvenile Court Act); 42 U.S.C. s 675(5)(C)

(1988) (Adoption Assistance & Child Welfare Act).) The statutes do not require, or suggest, that a newborn child's living environment cannot be modified if the child has lived with adoptive parents for a year and a half. Other cases cited by the appellate court in the case at bar (254 Ill.App.3d at 411 n. 2, 194 Ill.Dec. 311, 627 N.E.2d 648) do not justify the court's conclusion. *See Giacopelli v. Florence Crittenton Home* (1959), 16 Ill.2d 556, 158 N.E.2d 613 (custody dispute); *People ex rel. Edwards v. Livingston* (1969), 42 Ill.2d 201, 247 N.E.2d 417 (custody dispute); *In re Abdullah* (1981), 85 Ill.2d 300, 53 Ill.Dec. 246, 423 N.E.2d 915 (recognizing that it would not be in "best interests" of child to delay determination of biological father's fitness until father exhausted all criminal appeals and collateral review of biological father's murder conviction).

In addition, decisions from other jurisdictions do not support the appellate court's reasoning. For example, in denying the adoptive parents' application for a stay of a State court judgment that ordered return of an infant girl to her biological parents, Justice Stevens of the United States Supreme Court stated: "Applicants' claim that [the child's] best interests will be served by allowing them to retain custody of her rests, in part, on the relationship that they have been able to develop with the child after it became clear that they *357 were not entitled to adopt her. Neither [state] law * * * nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education. As the Iowa Supreme Court stated: '[C]ourts are not free to take children from parents simply by deciding another home appears more advantageous.' [Citation.]" (DeBoer v. DeBoer (1993), 509 U.S. ---, --- - ---, 114 S.Ct. 1, 1-2, 125 L.Ed.2d 755, 757.) Decisions from other States have also held that the parent's fitness must be determined before the court can proceed to an inquiry into the best interests of the child, and that parental rights cannot be terminated, under the guise of the child's "best interests," if the parent's unfitness has not be proven. See, e.g.,

In re B.G.C. (Iowa 1992), 496 N.W.2d 239; *Adoption of Kelsey S.* (1992), 1 Cal.4th 816, 823 P.2d 1216, 4 Cal.Rptr.2d 615.

It appears that the appellate court in the present cause was persuaded to the result it reached in large part because of the time that has elapsed since the child's birth and the circumstance that the child has lived continuously with his adoptive parents since the baby was a few days old. According to the appellate court, the "only parents that he has ever known are John and Jane Doe. He has not touched or seen [his birth mother] since four days after his birth, and he has never spoken a word to her. Nor has he ever touched, seen or communicated with [his biological father]. In fact, he is totally unaware of the existence of [his biological parents]." (254 Ill.App.3d at 413-14, 194 Ill.Dec. 311, 627 N.E.2d 648.) In comparison to the interests of the biological parents, the appellate court found the interests of the adoptive parents much more significant. For example, the appellate court noted that since the child "was a newborn, John and Jane Doe have done everything with [the child] that is the essence of being parents." 254 Ill.App. ****186 ***540** 3d.3d at 414, 194 Ill.Dec. 311, 627 N.E.2d 648.

I find the reasoning of the appellate court misguided. ***358** The respondent in the present case instituted proceedings to preserve his parental interest in his son less than two months after the child was born, and only a few weeks after he learned that the child was in fact alive. Although the child is now three years old, it is not the fault of the respondent that the boy has been in the custody of adoptive parents for the last three years. Nor is it the fault of the respondent that the child has not ever seen and is apparently unaware of his biological father.

No one would disagree with the view that children, especially those of tender years, should not be bantered about between biological and foster or adoptive parents. Delay damages the child, regardless of who is eventually awarded custody of the child. The parents, adoptive and biological, also suffer greatly and unnecessarily. These concerns, although valid, do not justify the

appellate court's decision in the instant cause to ignore the clear requirements of our Adoption Act that parental unfitness must be proven before the court can proceed to a consideration of the child's best interests.

Certain of the *amici* have suggested that the adoptive parents may be able to retain custody of the child in the present cause by filing a petition under the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/601 (West 1992) (standing of nonparent to file petition for custody if child is not "in the physical custody of one of his parents"); 750 ILCS 5/602 (West 1992) (custody determinations must be made according to the "best interest of the child")). They offer that the instant cause should be remanded to the circuit court so that the adoptive parents may file such a petition. It is also suggested that, in such a custody proceeding, the best interests of the child would take precedence over the wishes of the biological parents. (*See, e.g., In re Brandon L.E.* (1990), 183 W.Va. 113, 394 S.E.2d 515; *Clark, Children* ***359** and the Constitution, 1992 U.Ill.L.Rev. 1; Annot., 15 A.L.R.5th 692 (1993).) However, I do not address the merits of these arguments, since the questions are not properly before this court in the present appeal.

II

The appellate court also concluded that the respondent's parental rights were properly terminated because the respondent was an unfit parent. Section 1(D)(1) of our Adoption Act defines an "unfit person" to include a parent who has "fail[ed] to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth." (750 ILCS 50/1(D)(1) (West 1992).) Relying on section 1(D)(1) of the Adoption Act, the trial court concluded that respondent was an unfit parent because he had not shown reasonable interest in his son within 30 days after the child's birth. Because termination of parental rights is a permanent and complete deprivation and severance of the relationship between child and parent, legal

precedent has demanded a heightened standard of proof, i.e., clear and convincing evidence, in order to prove parental unfitness. (*See Santosky v. Kramer* (1982), 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599; *see also Stanley v. Illinois* (1972), 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551; see generally *Lehr v. Robertson* (1983), 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614; *Caban v. Mohammed* (1979), 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297; *Quilloin v. Walcott* (1978), 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511.) In my opinion, the proof presented here did not demonstrate, by clear and convincing evidence, that respondent was an unfit parent under section 1(D)(1) of the Adoption Act. Consequently, the trial court's determination was against the manifest weight of the evidence.

In *Syck*, 138 Ill.2d 255, 149 Ill.Dec. 710, 562 N.E.2d 174, this court suggested several factors to be taken into account in deciding whether a ***360** parent has exercised reasonable interest, concern, or responsibility in the child. The factors recited in *Syck* included whether "the actions and statements of others * * * hinder[ed] or discourage[ed] visitation [citation], and whether the parent's failure to visit the child was motivated by a need to cope with other aspects of his or her life or by true indifference to, and lack of concern ****187 ***541** for, the child [citation]." (*Syck*, 138 Ill.2d at 278-79, 149 Ill.Dec. 710, 562 N.E.2d 174.) The court also observed that, "mindful of the circumstances in each case, a court is to examine the parent's efforts to communicate with and show interest in the child, not the success of those efforts. [Citation.]" (*Syck*, 138 Ill.2d at 278-79, 149 Ill.Dec. 710, 562 N.E.2d 174.) Consistent with *Syck*, our appellate court has declined to find a parent unfit where the parent's efforts to establish or maintain parental interest in the children were thwarted, inhibited, hindered, or discouraged by the custodial parent or other interested persons. *See, e.g., Peyla v. Martin* (1976), 40 Ill.App.3d 373, 352 N.E.2d 407; *In re Jones* (1975), 34 Ill.App.3d 603, 340 N.E.2d 269;

Culkin v. Culkin (1975), 30 Ill.App.3d 1073, 333 N.E.2d 698; *In re Taylor* (1975), 30 Ill.App.3d 906, 334 N.E.2d 194.

In light of this precedent, the respondent in the present cause was not proven to be an unfit parent. As detailed in the appellate court opinion, the respondent made numerous efforts to aid the child's biological mother before the baby was born, and made numerous attempts to discover whether the child had been born. (See 254 Ill.App.3d at 419-24, 194 Ill.Dec. 311, 627 N.E.2d 648 (Tully, P.J., dissenting).) However, the respondent's efforts were blocked and frustrated by the misrepresentations of the biological mother and her relatives. It is undisputed that these persons persistently lied to the respondent and told him the baby had died, although the boy had not.

The appellate court agreed with the trial court's determination that the respondent had not shown adequate, reasonable interest in the child after birth. The ***361** appellate court believed that the respondent did not do all of the things that other persons might have done under similar circumstances to determine whether the child had actually died and to ascertain the child's whereabouts. (See 254 Ill.App.3d at 415, 194 Ill.Dec. 311, 627 N.E.2d 648 (suggesting that respondent in present cause could have gone to biological mother's residence "to speak to her directly and confront her about the welfare of his expected child," or that the respondent could have contacted the prenatal physician, or conferred with an attorney or "any public legal agency").) However, the respondent's actions are not to be judged by whether they were successful, but rather by whether they were sincere, genuine efforts to locate and establish contact with the child. The record does not establish that the respondent's efforts were so insufficient or insincere that he should be deprived of his parental interests in his son.

In addition, I believe that the adoptive parents shared a portion of the risk that the respondent, if he discovered the child were still alive, would attempt to assert his parental rights to the child. The record indicates that the adoptive parents were informed of the

biological mother's intention to prevent the respondent from asserting any parental interest in the child whatsoever, by misrepresenting to the respondent that the baby had died, even though the biological mother knew the father's identity, as well as his whereabouts. The adoptive parents acquiesced in the biological mother's scheme. The record is devoid of any indication that the adoptive parents made any effort to ascertain the identity of the respondent, or his whereabouts, so that he could be advised of the child's existence.

For these reasons, I concur in the decision of the majority in the instant cause.

MILLER and FREEMAN, JJ., join in this concurrence.

*362 SUPPLEMENTAL OPINIONS
UPON DENIAL OF REHEARING

Justice HEIPLE, writing in support of the denial of rehearing:

On Thursday, June 16, 1994, this court reversed a decision by a divided appellate court which had affirmed certain adoption proceedings in the circuit court of Cook County. Our reversal was the result of the failure of the courts below to correctly apply Illinois law in terminating the natural father's parental rights. This cause is now before the court on petitions for rehearing filed by the adoptive parents and the guardian ad litem for the child. The following is **188 ***542 offered in support of today's order denying rehearing.

I have been a judge for over 23 years. In that time, I have seldom before worked on a case that involved the spread of so much misinformation, nor one which dealt with as straightforward an application of law to fact.

As was made clear in the majority opinion, a conspiracy was undertaken to deny the natural father any knowledge of his son's existence. It began when the biological mother, 8 1/2 months pregnant, was misinformed that the father, her fiance, had left her

for another woman. She left their shared home and, at the encouragement of a social worker, agreed to give up her child. The social worker called her personal attorney, who contacted the adoptive mother (that attorney's friend and employee). At the behest of the adoptive parents and their attorney, the mother gave birth at a different hospital than she and the father had planned to avoid the father's intervention; the mother surrendered the baby to strangers four days after his birth; and then falsely told the father that the child had died. All of this occurred in the space of less than three weeks.

The father did not believe the mother, and he immediately began an intensive and persistent search *363 and inquiry to learn the truth and locate the child. On the 57th day following the child's birth, the father learned of his son's existence and of the pending adoption. On that day, he hired a lawyer and contested the adoption of his son by strangers. One may reasonably ask, What more could he have done? What more should he have done? The answer is that he did all that he could and should do.

The majority opinion pointed out that the adoptive parents should have relinquished the baby at that time. That is to say, on the 57th day. Instead of that, however, they were able to procure an entirely erroneous ruling from a trial judge that allowed the adoption to go forward. The father's only remedy at that stage was a legal appeal which he took. He is not the cause of the delay in this case. It was the adoptive parents' decision to prolong this litigation through a long and ultimately fruitless appeal. Now, the view has been expressed that the passage of time warrants their retention of the child; that it would not be fair to the child to return him to his natural parents, now married to each other, after the adoptive parents have delayed justice past the child's third birthday.

For a fuller and more detailed account of the father's efforts and the underlying facts, one may refer to the dissenting opinion authored by Justice Tully in the appellate court decision rendered below. (254 Ill.App.3d 405, 418, 194 Ill.Dec. 311, 627 N.E.2d

648 (Tully, P.J., dissenting).) As noted by Justice Tully, Justice Rizzi, writing the majority opinion for himself and Justice Cerda, "patently distorted and slanted the facts on a number of important points." I would further add that Justice Rizzi grossly misstated the law.

If, as stated by Justice Rizzi, the best interests of the child is to be the determining factor in child custody cases (254 Ill.App.3d at 412, 194 Ill.Dec. 311, 627 N.E.2d 648), persons seeking babies to ***364** adopt might profitably frequent grocery stores and snatch babies from carts when the parent is looking the other way. Then, if custody proceedings can be delayed long enough, they can assert that they have a nicer home, a superior education, a better job or whatever, and that the best interests of the child are with the baby snatchers. Children of parents living in public housing or other conditions deemed less than affluent and children with single parents might be considered particularly fair game. The law, thankfully, is otherwise.

In 1972, the United States Supreme Court, in the case of *Stanley v. Illinois* (1972), 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 ruled that unmarried fathers cannot be treated differently than unmarried mothers or married parents when determining their rights to the custody of their children. (*Stanley*, 405 U.S. at 658, 92 S.Ct. at 1216, 31 L.Ed.2d at 562- 63.) The courts of Illinois are bound by that decision. Subsequently, in 1990, a unanimous Illinois Supreme Court pointed out that when ruling on parental unfitness, a court is not to consider the child's best interests, since the child's welfare is not relevant ****189 ***543** in judging the fitness of the natural parent; that only after the parent is found by clear and convincing evidence to be unfit does the court proceed to consider the child's best interest and whether that interest would be served if the child were adopted by the petitioners. *In re Adoption of Syck* (1990), 138 Ill.2d 255, 276-78, 149 Ill.Dec. 710, 562 N.E.2d 174.

Under Illinois law, a parent may be divested of his parental rights either voluntarily (e.g., consenting to an adoption (see Ill.Rev.Stat.1991, ch. 40, par. 1513)) or involuntarily (e.g., finding of abuse, abandonment, neglect or lack of sufficient interest (see Ill.Rev.Stat.1991, ch. 40, par. 1510)). As noted in the majority opinion, the adoption laws of Illinois are neither complex nor difficult of application. These laws intentionally place ***365** the burden of proof on the adoptive parents. In addition, Illinois law requires a good-faith effort to notify the natural father of the adoption proceedings. (Ill.Rev.Stat.1991, ch. 40, par. 1509.) We call this due process of law. In the case at hand, both the adoptive parents and their attorney knew that a real father existed whose name was known to the mother but who refused to disclose it. Under these circumstances, the adoptive parents proceeded at their peril.

The best interest of the child standard is not to be denigrated. It is real. However, it is not triggered until it has been validly determined that the child is available for adoption. And, a child is not available for adoption until the rights of his natural parents have been properly terminated. Any judge, lawyer, or guardian ad litem who has even the most cursory familiarity with adoption laws knows that. Justice Rizzi, if he is to be taken at face value, does not know that.

Columnist Bob Greene apparently does not care. Rather, columnist Greene has used this unfortunate controversy to stimulate readership and generate a series of syndicated newspaper columns in the Chicago Tribune and other papers that are both false and misleading. In so doing, he has wrongfully cried "fire" in a crowded theatre, and has needlessly alarmed other adoptive parents into ill- founded concerns that their own adoption proceedings may be in jeopardy. In support of his position, Greene has stirred up contempt against the Supreme Court as an institution, concluding one of his columns by referring to all of the Justices with the curse,

"Damn them all." Chicago Tribune, June 19, 1994, Tempo Section, page 1.

Greene's implicit objective is to secure justice for a child. With that ethical and moral imperative, of course, no one could disagree. Greene, however, elevates himself above the facts, above the law, and above the Supreme ***366** Court of Illinois. He arrogates to himself the right to decide the case.

In support of his objective, Greene brings to bear the tools of the demagogue, namely, incomplete information, falsity, half-truths, character assassination and spurious argumentation. He has conducted a steady assault on my abilities as a judge, headlining one of his columns "The Sloppiness of Justice Heiple." Another was entitled "Supreme Injustice for a Little Boy." He has shown my picture in his columns with bylines reading, respectively, "Justice Heiple: Ruling takes boy from home," and "James D. Heiple: No justice for a child." References to, respectively, Chicago Tribune, June 26, 1994, Tempo Section, page 1; June 19, 1994, Tempo Section, page 1; June 26, 1994, Tempo Section, page 1; June 19, 1994, Tempo Section, page 1.

Make no mistake about it. These are acts of journalistic terrorism. These columns are designed to discredit me as a judge and the Supreme Court as a dispenser of justice by stirring up disrespect and hatred among the general population.

Lest we forget the place from which he comes, let us remind ourselves that Greene is a journalist with a product to sell. He writes columns for a living. His income is dependent on writing and selling his columns to newspapers. He cannot secure either sales or earnings by writing on subjects that lack impact or drama. So, he must seek out subjects that are capable of generating wide public interest. An adoption case involving two sets of parents contesting for the custody of a three-year-old boy is a ready-made subject for this type of journalist. So far, so good.

**190 ***544 The trouble with Greene's treatment of the subject, however, is that his columns have been biased, false and misleading. They have also been destructive to the cause of justice both in this case and in the wider perspective. *367 Part of Greene's fury may be attributable to the fact that he staked out his views on this case in a published column that appeared on August 22, 1993. (Chicago Tribune, August 22, 1993, Tempo Section, page 1.) Subsequently, on June 16, 1994, the Supreme Court had the audacity to base its decision on the law rather than on his newspaper column. So much for his self-professed moralizing.

That Greene has succeeded to a limited degree cannot be denied. I have, indeed, received several pieces of hate mail with such epithets as idiot, jerk, etc. The Governor, in a crass political move, announced his attempt to intervene in the case. And the General Assembly, without meaningful debate or consideration, rushed into law a constitutionally infirm statute with the goal of changing the Supreme Court's decision.

Both the Governor and the members of the General Assembly who supported this bill might be well advised to return to the classroom and take up Civics 101. The Governor, for his part, has no understanding of this case and no interest either public or private in its outcome. The legislature is not given the authority to decide private disputes between litigants. Neither does it sit as a super court to review unpopular decisions of the Supreme Court. We have three branches of government in this land. They are designated as the legislative, the executive and the judicial. Legislative adjudication of private disputes went by the wayside generations ago. Moreover, this case cannot be decided by public clamor generated by an irresponsible journalist. Neither can it be decided by its popularity or lack thereof. This case can only be decided by a court of law. That is a judicial function pure and simple. For the Supreme Court to surrender to this assault would be to surrender its independence, its integrity and its reason for being. In so doing, neither justice to the litigants nor the public

*368 interest would be served. Under the circumstances, this case looms even larger than the child or the two sets of contesting parents.

Many law suits are painful matters. This case is no exception. Capital cases, for instance, demand the forfeiture of the life of the defendant. Damage suits take money away from some people and give it to others. No one ever claimed that both sides walk away from a law suit with smiles on their faces. No member of this court ever entertained any thought that the decision it rendered in this case would be easy to accept by the losing litigants. Such an event would be incredible.

As for the child, age three, it is to be expected that there would be an initial shock, even a longing for a time in the absence of the persons whom he had viewed as parents. This trauma will be overcome, however, as it is every day across this land by children who suddenly find their parents separated by divorce or lost to them through death. It will not be an insurmountable trauma for a three-year-old child to be returned, at last, to his natural parents who want to raise him as their own. It will work itself out in the fullness of time. As for the adoptive parents, they will have to live with their pain and the knowledge that they wrongfully deprived a father of his child past the child's third birthday. They and their lawyer brought it on themselves.

This much is clear. Adoptive parents who comply with the law may feel secure in their adoptions. Natural parents may feel secure in their right to raise their own children. If there is a tragedy in this case, as has been suggested, then that tragedy is the wrongful breakup of a natural family and the keeping of a child by strangers without right. We must remember that the purpose of an adoption is to provide a home for a child, not a child for a home.

*369 Justice FREEMAN, also writing in support of the denial of rehearing:

I wholeheartedly concur in the court's decision to deny rehearing in this case.

In the weeks since the publication of this court's opinion in this case, there has been a tremendous public outcry. In light of the immediate consequences to all concerned, **191 ***545 such was to be expected. We are, nonetheless, no less focused or certain of our mandate. We are constrained to interpret and apply the law as it is enacted by our legislature. This remains so, even in the midst of strong public opinion, media attention, and legislative action which comes now, only in the wake of what has been popularly deemed an unpopular decision. Our role is clear, and we possess no authority to deviate from our mandate. To now entreat and, further, require that we either rewrite or apply a law enacted based upon the testing of public opinion, results in an unworkable restructuring of the three branches of government.

To avoid what promises to be an emotionally difficult transition for this child, public sentiment would have us find that it is in his best interest to validate this adoption. For as much as this child has been received, loved and cared for by his adoptive parents, we may not rule oblivious to and in total disregard of the rights of his natural parents.

As petitioner correctly concedes, we are constrained to determine the issue of unfitness prior to engaging in any determination of the child's best interest. This we have done. We have reviewed the particularly unique set of facts in this case. And, based upon that review, we have determined that a conclusion opposite that which the trial and appellate courts reached is clearly evident.

Petitioner asserts that in that our review, we have inappropriately reweighed the evidence, and, in effect, substituted our judgment for that of the trial court. Our *370 consideration of the evidence necessarily requires some sifting to determine its adequacy. Such a review, though not without limitation, is clearly

within our province and requires more than a mere perfunctory examination.

In light of our findings, no purpose can be served by allowing rehearing in this case. The only thing to be gained by such unwarranted action is further, and still further, delay. Such delay can only serve to increase the difficulty already attendant the pending separation of this youngster from his adoptive parents. Equally as important a concern, however, is the avoidance of any unnecessary delay in the unification of this child and his natural parents and his assimilation process into his birth family.

For these reasons, I concur in the denial of the petition for rehearing.

Justice McMORROW, dissenting from the denial of the petitions for rehearing:

I vote to allow the petitions for rehearing. I believe that the petitioners should be afforded another opportunity to present further argument on the specific legal and factual errors they believe this court has made in its decision. I am acutely sensitive to the future well being of the young boy in the instant case and the trauma which may be visited on him by this court's ruling. The lengthy period of time it has taken for his case to travel through the court system has exacerbated the complexity of the issues involved.

Issues that form the basis of my vote to allow the petitions for rehearing include: the extent of the court's duty to protect children when that protection may conflict with parental rights established by law; the propriety of the court's disregarding laws designed to prevent the taking of a child from biological parents where the evidence of parental unfitness may be *371 insufficient but where the best interests of the child call for such separation; whether the broad policy statement in the Adoption Act concerning the best interests of the child should be interpreted as predominant over the articulated requirements of the Act; and whether which, if any, of the courts involved in this case misapprehended, unduly

emphasized, or attached inappropriate credibility to certain evidence presented at trial. Further argument on these matters would be helpful.

I authored a concurring opinion in this case, joined in by two other justices, which analyzed the existing statutory, constitutional, and case law that applies to the case at bar. Irrespective of the court's liking or agreement with that law, the court is duty-bound to follow that law. Under that law, parental unfitness must be proven by clear and convincing evidence before the court can proceed, in an adoption hearing, to a consideration of any other issue. Whether use of the parental rights doctrine, rather than the best interest of the child doctrine, as a standard **192 ***546 in child adoption proceedings is realistic is a policy matter for legislative--rather than judicial--consideration.

If a child has lived in a particular home for a significant period of time, courts may desire to permit the child to remain in that home, notwithstanding any other factor. However, as indicated, the courts are required to follow the existing laws of this State regarding the termination of the biological parents' interests. The authority to amend existing statutory provisions that may be improvident is vested in the legislature, not the courts.

Notwithstanding these limitations, I believe that the petitioners should be permitted the opportunity, if they are able, to establish reasons why the judgment of the court was erroneous, under existing law. In my opinion, this court should grant the petitions for rehearing and *372 carefully scrutinize the arguments presented, to eliminate the possibility that any material aspect of this appeal has been incorrectly decided. Therefore, I dissent from the denial of the petitions for rehearing.

MILLER, J., joins in this dissent.

627 N.E.2d 648
254 Ill. App. 3d 405

In Re Petition of John DOE and Jane Doe, Husband and Wife, To Adopt Baby Boy, A Minor.

No. 1-92-1552.

Appellate Court of Illinois,
First District, Third Division.

Judgment affirmed.

Opinion filed Aug. 18, 1993.

Petition was filed for adoption of child born out-of-wedlock. The Circuit Court, Cook County, Eugene Wachowski, J., held that biol ogical father was unfit person to have child, such that his consent could be dispensed with. Biological father appealed. The Appellate Court, Rizzi, J., held that: (1) it would be contrary to best interest of child to disturb judgment of adoption once child had lived with adoptive parents for more than 18 months, and (2) father was unfit person to have custody of child based on his failure to demonstrate reasonable degree of interest, concern, or responsibility as to child's welfare during first 30 days after child's birth.

Affirmed.

Tully, P.J., dissented and filed opinion.

[1] ADOPTION k20

Adopted child is not piece of property with property rights belonging to either his biological or adoptive parents; child belongs to no one but himself.

[2] ADOPTION k11

INFANTS k19.3(1), 200

Child is real party in interest in any adoption, custody or abuse case.

[3] ADOPTION k13

INFANTS k154.1

PARENT AND CHILD k2(3.1)

In adoption cases, like custody and abuse cases, child's best interest is and must remain inviolate and impregnable from all other factors, including interests of parents; to extent there is any conflict between child's best interest and rights and interests of parents, interest of child must prevail.

[4] ADOPTION k16

Once newborn child has been placed for adoption and lived continuously with adoptive parents for longer than 18 months, it would be contrary to best interest of child to remove him from his home and family by disturbing judgment of adoption; accordingly, judgment may not be disturbed, notwithstanding interests of child's biological parents.

[5] ADOPTION k7.3

Recently arrived immigrant who was child's biological father was not fit person to have custody of child, so that his consent was not prerequisite to validity of adoption, based on immigrant's failure to demonstrate reasonable degree of interest, concern or responsibility as to welfare of child during the first 30 days after child's birth; although immigrant had made numerous phone calls (which were refused) to child's mother and allegedly made inquiries at various hospitals, he did not consult attorney, institute paternity proceedings, or take other steps that responsible unwed man would take if he expected that woman was about to give birth to his child. S.H.A. 750 ILCS 50/1, subd. D(l), 8(a)(1).

[6] ADOPTION k7.3

In deciding whether biological father has demonstrated reasonable degree of interest, concern or responsibility as to welfare of his newborn child during the first 30 days after child's birth, such that father's consent cannot be dispensed with as prerequisite to child's adoption, court may consider what occurred during entire pregnancy and birth. S.H.A. 750 ILCS 50/1, subd. D(l), 8(a)(1).

****649 ***312 *406** Loren L. Heinemann, Orland Park, for appellants.

Richard A. Lifshitz, Carolyn E. Winter, Chicago, for appellee.

Justice RIZZI delivered the opinion of the court:

John and Jane Doe filed a petition to adopt a newborn baby boy, Richard.[1] Richard's biological mother, Daniella Janikova (Daniella), and father, Otakar Kirchner (Otakar), were not married. Daniella executed a consent to have Richard placed for adoption four days after he was born. Daniella, however, did not tell Otakar. Otakar was told that Richard died shortly after his birth. Daniella did not tell Otakar that Richard was living and had been placed for adoption until Richard was 57 days old. After he discovered that Richard had been placed for adoption, Otakar opposed the adoption on the basis that he did not consent. Otakar and Daniella then got married. The adoption case proceeded to trial. The trial court found that Otakar was an unfit person to have a ***407** child and therefore his consent for the adoption of Richard was not required. 750 ILCS 50/8, 50/14 (West 1992). The trial court then entered a judgment of adoption, with John and Jane Doe adopting Richard. Otakar has appealed from the judgment of adoption and the orders inherent to the validity of the judgment of adoption. We affirm.

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[1] Richard is a fictitious name which we are using to make reference to the baby boy who is the subject of this case.

Otakar, age 36, and Daniella, age 25, are emigres from the former republic of Czechoslovakia. Otakar arrived in the United States in 1986, and Daniella arrived in 1988. In the fall of 1989, they met while working together at a restaurant. They then began living together in an apartment in Chicago. In June of 1990, Daniella became pregnant and she and Otakar were advised that the baby was due to be born on March 16, 1991. Around July of 1990, Daniella stopped working and became a full-time student to become a beautician. She was dependent solely upon Otakar for financial support.

Otakar and Daniella continued to live together, and Otakar paid for Daniella's prenatal care. They planned that the baby would be born at St. Joseph's Hospital in Chicago, which is only one block from where they lived.

In January of 1991, Otakar returned to Czechoslovakia for a vacation and to attend to family matters related to his gravely ill grandmother. He remained in Czechoslovakia about 13 days. While Otakar was in Czechoslovakia, however, Daniella received a telephone call from Otakar's aunt. She told Daniella that Otakar had been seeing his former girl friend in Czechoslovakia and that they had married and were on their honeymoon. Daniella became upset. She telephoned Otakar in Czechoslovakia and told him that she did not want to see him anymore. Otakar told Daniella that the story his aunt told her was not true. Nevertheless, Daniella moved out of the apartment and into a shelter for abused women located in Chicago.

While she lived at the shelter, Daniella decided that she would place the baby for adoption. Daniella told her friend, Roberta Scholes, of her plan. Scholes contacted a lawyer for Daniella. Meanwhile, on February 8, 1991, Otakar returned from Czechoslovakia and went to his apartment, where he found that Daniella had moved out and taken all of her belongings.

**650 ***313 On February 11, 1991, Daniella met with the lawyer and John and Jane Doe about the proposed adoption. Daniella refused to disclose the name of the baby's biological father to the Does or their lawyer.

There were several meetings between Daniella and the Does and their lawyer. At the meetings, Daniella stated that she knew who the biological father of the baby was, but she did not want to disclose his identity because she feared that he would assert his parental rights.

*408 In mid-February 1991, Daniella left the shelter and went to live with her uncle in his house in the Village of Hillside. Otakar knew that Daniella was living at her uncle's house. Otakar telephoned Daniella several times, but she refused to speak to him or return his calls.

Otakar claims that he asked mutual friends to talk to Daniella on his behalf, but Daniella refused their efforts. In addition, during the latter part of February 1991, Otakar gave $500 to a mutual friend, Selva Duran, and asked her to give the money to Daniella. Daniella, however, refused to take the $500.

During the latter part of February, Daniella met with Otakar twice. First, they met at a restaurant. The following day, approximately February 28, 1991, Daniella went to Otakar's apartment where they engaged in sexual intercourse. Otakar asked Daniella to return and live with him in the apartment, but she refused. The next day, Daniella telephoned Otakar and told him that she did not want to see him again. Nevertheless, Otakar made numerous telephone calls trying to reach Daniella at her uncle's house, to no avail.

On March 16, 1991, Daniella went to Alexian Brothers Hospital in Elk Grove Village, Illinois, and Richard was born. Daniella refused to name or identify the biological father of the child. Meanwhile, on March 16, 1991, Otakar had made inquiry about Daniella at St. Joseph's Hospital because when they were

living together that is where he and Daniella had planned to have the birth of the baby. He was told that Daniella had not been admitted into the hospital. Otakar checked with St. Joseph's Hospital for several days and each time he was told that they had no record of a Daniella Janikova.

On March 20, Daniella executed a document entitled FINAL AND IRREVOCABLE CONSENT TO ADOPTION, for Richard, at the Cook County Department of Supportive Services. See 750 ILCS 50/9, 50/10 (West 1992). On the same day, the Does filed a Petition for Adoption, which averred that the biological father of the child was unknown. Also, a statutory notice by publication was made in the Chicago Daily Law Bulletin, with the averment that the biological father of the child was unknown. 750 ILCS 50/7 (West 1992). March 20, 1991, was also the day that Richard was placed to live with the Does.

Otakar had not been told that Richard had been placed for adoption. On March 20, 1991, Otakar spoke with Daniella's uncle on the telephone. Daniella's uncle told Otakar that the baby had died three days after birth. Daniella's uncle had lied about what had occurred at the direction of Daniella. Daniella's uncle spoke to Otakar subsequently on two other occasions, and each time he told Otakar that the baby had died. It appears, however, that Otakar did not believe that the baby had ***409** died. On about March 26, Otakar telephoned Daniella at her uncle's house and left a message on the answering machine: "I don't believe the baby died."

Otakar claims that on many occasions after work at around 3 a.m., he went to Daniella's uncle's house, where Daniella was living. He looked into Daniella's parked automobile to see if there was an infant's car seat or baby bottles; he also went through the garbage cans at the curb of the house to see if there were any diapers or other similar items. Otakar also claims that he made inquiry at some hospitals seeking information about Daniella and the birth of the baby, to no avail. He also claims that some friends

helped him in searching through official public records for a birth or death certificate. They found nothing.

At some time between May 5 to May 10, 1991, Selva Duran told Otakar that the baby did not die but was placed for adoption. This is the first time that Otakar had been told that the baby had been placed for adoption. **651 ***314 Otakar did not see or speak to Daniella, however, until May 12, 1991; he had not seen or spoken to Daniella since March 1, 1991. When Otakar went to his apartment after work on May 12, 1991, he found that Daniella had moved back into the apartment, and she told him that the baby had been adopted. Otakar testified: "She said she made a mistake and she can't do nothing anymore because she signed away her whole rights."

On May 18, 1991, more than two months after Richard was born, Otakar spoke to a lawyer for the first time about this matter. On June 6, 1991, Otakar filed an appearance in the adoption proceeding, and on June 13 he sought leave of court to file an Answer. On June 15, 1991, the trial court struck Otakar's Answer on the basis that he had no standing in the adoption proceeding.

On September 12, 1991, Otakar and Daniella married. On September 23, 1991, Otakar filed a Petition To Declare Paternity. The paternity action proceeded to trial on December 9, 1991, and on that day there was a finding that Otakar was the biological father of Richard.

On December 23, 1991, the Does filed an Amended Petition To Adopt. The amended petition alleged that Otakar was an unfit person to have a child and that therefore his consent for the adoption of Richard was not required. 750 ILCS 50/8, 50/14 (West 1992). The amended petition alleged that Otakar was unfit for the reason that there was a "failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first 30 days after its birth." 750 ILCS 50/1D(l) (West 1992).

The adoption trial started on May 5, 1992. On May 6, 1992, the trial court found by clear and convincing evidence that Otakar had failed to ***410** demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first 30 days after the birth. In making its ruling, the trial court stated:

> "That brings me to the conclusion that the law must be strictly complied with, and that the law provides for some interest in the reasonable degree of interest for the child in the first thirty days of the child's existence. Had Mr. Kirchner, instead of probing through garbage bags, gone to [legal counsel] at that juncture there would be no such proceedings here. She would have been in Court, that is Daniella Janikova, and she would have been telling the world where the child was and disclosing what interests Mr. Kirchner had in this child. Instead of that in all this time that he wasted trying to contact hospitals, and, again, looking through garbage, he found nothing.
>
> Daniella, of course, testified here in open court that she deliberately lied about the birth of the child in suggesting the death of the child, unconscionable behavior.
>
> So it is going to be the finding of this court that there is clear and convincing evidence that there was no reasonable degree of interest indicated by Mr. Kirchner in the first thirty days of the life of this child."

On May 8, 1992, the trial court entered an order that Otakar was an unfit person to have a child and that therefore his consent for the adoption of Richard was not required, and that his parental rights were terminated. On May 13, 1992, a judgment for adoption of Richard was entered, with the irrevocable consent to adoption executed by Daniella on March 20, 1991, but without the consent of Otakar. See 750 ILCS 50/14 (West 1992).

Otakar filed a Notice of Appeal on May 8, 1992. On appeal, Otakar claims that the judgment of adoption and the orders inherent to the validity of the judgment of adoption should be reversed, and that Richard be turned over to live with him and Daniella.

Richard has lived continuously with John and Jane Doe since March 20, 1991, four days after his birth. He is now, August 18, 1993, two years and five months old.

[1] Fortunately, the time has long past when children in our society were considered the property of their parents. Slowly, but finally, when it comes to children even the law has rid itself of the *Dred Scott* mentality that a human being can be considered a piece of property "belonging" to another human being. To hold that a child is the property of **652 ***315 his parents is to deny the humanity of the child. Thus, in the present case we start with the premise that Richard is not a piece of property with *411 property rights belonging to either his biological or adoptive parents. Richard "belongs" to no one but himself.

[2] Of course, in any parental relationship a parent and a child both have rights, *vis-a-vis*, each other, which are protected under the law. In an adoption, custody or abuse case, however, the child is the real party in interest. Since the child is the real party in interest, it is his best interest and corollary rights that come before anything else, including the interests and rights of biological and adoptive parents.

Here, by inherent necessity, whether or not raised by the embroiled and warring biological and adoptive parents, the best interest of Richard surfaces as the paramount issue in the case.[2]

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[2] On the issue of the best interest of the child, the parties have referred to *In re Adoption of Syck* (1990), 138 Ill.2d 255, 149 Ill.Dec. 710, 562 N.E.2d 174, for the proposition that the best interest of the child should not be considered when determining whether a parent is unfit. *Syck*, however, is distinguishable and not controlling here. In *Syck*, there was no judgment of adoption entered; the child

(continued...)

If there is a conflict between Richard's best interest and the rights and interests of his parents, whomever they may be, the rights and interests of the parents must yield *412 and allow the best interest of Richard to pass through and prevail. This tenet allows for no exception.

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[2](...continued)
was not a newborn, but rather was 8 years old; the issue of unfitness did not relate to the first 30 days after the child's birth, as does the present case; and the issue of unfitness involved 750 ILCS 50/1D(b), rather than 750 ILCS 50/1D(l). Also, after *Syck* was decided, the Illinois legislature has made it the public policy of Illinois that the best interest of the child must be considered and be paramount to the interests of his parents in making a permanent home for the child. *See* 705 ILCS 405/2-14 (West 1991), amended, effective June 24, 1993. Moreover, our holding as to the best interest of the child is consistent with what the Illinois Supreme Court has stated:

> "*In Giacopelli v. The Florence Crittenton Home*, 16 Ill.2d 556, [158 N.E.2d 613], we stated at 565 [158 N.E.2d 613]: 'It is always recognized that a natural parent has a superior right to the custody of his child. That right, however, is not absolute and must yield to the best interest of the child. Such superior right only obtains when it is in accord with the best interest of the child.'
>
> The best interest of the child is the standard and it is not necessary that the natural parent be found unfit or be found to have legally forfeited his rights to custody, if it is in the best interest of the child that he be placed in the custody of someone other than the natural parent. * * * The parents' natural rights must give way to the welfare and best interest of the child." *People ex rel. Edwards v. Livingston* (1969), 42 Ill.2d 201, 209, 247 N.E.2d 417, 421.

In determining whether the biological father was unfit pursuant to the Adoption Act, the Illinois Supreme Court stated in, *In re Abdullah*:

> "Moreover, the paramount consideration in this case is what will happen to Hannibal. (Ill.Rev.Stat. 1977, ch. 40, par. 1525.) His best interest must be considered, and further delay in the disposition of this case is not in his best interest. Hannibal is already 6 years old. His future should be settled as quickly as possible." *In re Abdullah*, (1981) 85 Ill.2d 300, 310 [53 Ill.Dec. 246, 251], 423 N.E.2d 915, 920.

[3] A child's best interest is not part of an equation. It is not to be balanced against any other interest. In adoption cases, like custody and abuse cases, a child's best interest is and must remain inviolate and impregnable from all other factors, including the interests of the parents. *In re Ashley K.* (1991), 212 Ill.App.3d 849, 879, 156 Ill.Dec. 925, 943, 571 N.E.2d 905, 923; 705 ILCS 405/2-14(a); 750 ILCS 50/20a (West 1992). In recognition of this fact, the Adoption Act provides:

> "Best interest and welfare of child--Construction of Act * * * The best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act." 750 ILCS 50/20a (West 1992).

Attempting to resolve what is the best interest of an infant is obviously a wrenching ordeal. In cases like the present, however, if one focuses on the child while disregarding the tendentious arguments of the biological and adoptive parents, he is left with the unquestionable conclusion that resolution of the issue of parentage quickly is foremost in the best interest of the child. Also, serious delay in resolving the child's parentage not only frustrates the best interest of the child, but it can cause grave harm to the child.

****653 ***316** The best interest of children was recently considered by the Illinois legislature when it amended the Juvenile Court Act to place the best interest of children paramount to the rights and interests of parents. The Juvenile Court Act, as amended, reads as follows:

> Date for Adjudicatory Hearing.
>
> (a) Purpose and policy. The legislature recognizes that serious delay in the adjudication of abuse, neglect, or dependency cases can cause grave harm to the minor and the family and that it frustrates the best interests of the minor and the effort to establish permanent homes for children in need. The purpose of this Section is to insure

> that, consistent with the federal Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272, as amended, and the intent of this Act, the State of Illinois will act in a just and speedy manner to determine the best interests of the minor, including providing for the safety of the minor, identifying families in need, reunifying families where it is in the best interests of the minor, and, if reunification is not in the best interests of the minor, finding another permanent home for the minor. ***413** 705 ILCS 405/2-14 (West 1992).

The Federal Adoption Assistance and Child Welfare Act of 1980, Public Law 96- 272, as amended, to which the Juvenile Court Act makes reference, reads as follows:

> "The term 'case review system' means a procedure for assuring that–
>
> * * * * * *
>
> (C) with respect to each child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a dispositional hearing to be held * * * no later than eighteen months after the original placement * * *, which hearing shall determine the future status of the child (including, but not limited to, whether the child should be returned to the parent * * * [or] should be placed for adoption * * *) * * *." 42 U.S.C. s 675(5)(C) (1988).

[4] We extrapolate and infer from the Juvenile Court Act, as amended, and the federal Adoption Assistance and Child Welfare Act of 1980, Public Law 96- 272, as amended, that after a newborn child has been placed for adoption and lives continuously thereafter for longer than 18 months with his adopting parents who adopt or have adopted him pursuant to a judgment of adoption, it would be

contrary to the best interest of the child to remove him from his home and family by disturbing the judgment of adoption.[3]

The present case vividly illustrates why it would be contrary to the best interest of the child to remove him from the parents who adopted him if he has lived with them continuously for the first 18 months of his life. Richard is now two years and five months old. The only parents that he has ever known are John and Jane Doe. He has not touched or seen Daniella since four days after his birth, and he has never spoken a word to her. Nor has he *414 ever touched, seen or communicated with Otakar. In fact, he is totally unaware of the existence of Daniella and Otakar.[4]

The fact that we have the Adoption Act in Illinois is a recognition in the law that it takes more to being a parent than being one of the sexual partners to the physiological formation of a child. Since Richard was a newborn, John and Jane Doe have done everything **654 ***317 with Richard that is the essence of being parents, and Richard has done everything with them that is the essence of being a son. Contrariwise, since he was a newborn, Daniella and Otakar have done nothing with Richard that is the

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[3] The Adoption Act itself recognizes time limitations in adoption proceedings, even in actions based on fraud and duress. The Adoption Act provides: "No action to void or revoke a consent to or surrender for adoption, including an action based on fraud or duress, may be commenced after 12 months from the date the consent or surrender was executed." 750 ILCS 50/11 (West 1992).

[4] Although the interest of Daniella is not legally an issue, one can hardly blink at the reality of her interest in the case. After refusing to identify Otakar as the biological father of Richard and signing a final and irrevocable consent to adoption, she lied about Richard's birth. She attempted to obtain a fake death certificate for him. She later had her uncle tell Otakar that Richard died. Subsequently, however, she married Otakar. Now, both Otakar and Daniella wish to have the judgment of adoption vitiated. In such instances, courts should not favor any interest that the biological mother may have in the case, and should view her testimony as would Diogenes.

essence of being parents, and he has done nothing with them that is the essence of being a son.

There comes a point when we should not be ignorant as judges of what we know as men and women. *See Watts v. Indiana* (1949), 338 U.S. 49, 52, 69 S.Ct. 1347, 1349, 93 L.Ed. 1801, 1805; *People v. Gilliard* (1983), 112 Ill.App.3d 799, 807, 68 Ill.Dec. 440, 447, 445 N.E.2d 1293, 1300. Plainly, it would be contrary to the best interest of Richard to "switch" parents at this stage of his life. We must therefore act accordingly. Courts are here to protect children--not to victimize them.

Under the circumstances, we conclude that it would be contrary to the best interest of Richard to disturb the judgment of adoption. We, therefore, affirm the judgment of adoption and the orders inherent to the validity of the judgment of adoption for the reason that it would be in the best interest of Richard and he is the real party in interest.

[5] We also affirm the judgment of adoption and the orders inherent to the validity of the judgment of adoption for another reason. There is clear and convincing evidence that Otakar was an unfit person to have a child because he failed to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first 30 days after the birth. 750 ILCS 50/1D(l), 50/8(a)(1) (West 1992). His consent to the adoption was therefore not required. 750 ILCS 50/14 (West 1992).

[6] One may rightfully infer that a man who has a reasonable degree of interest, concern or responsibility as to the welfare of his newborn child *415 would have assiduously tracked what was happening during the pregnancy and the birth of the child. It follows that when a court is considering whether a biological father has demonstrated a reasonable degree of interest, concern or responsibility as to the welfare of his newborn child during the first 30 days after the birth, the court may consider what occurred

during the entire pregnancy and birth as going to the weight and credence of the testimony and evidence in the case.

Here, we must bear in mind that Otakar had returned from Czechoslovakia and was living in Chicago more than a month before Richard was born. Although he and Daniella were not married, he knew the due date for the birth of Richard. Yet, he did virtually nothing that a responsible unwed man would do if he expected that a woman would soon give birth to his child. It is no solace for Otakar to claim that the mother did not answer his telephone calls and he let it be. More needed to be done to demonstrate a reasonable degree of interest, concern and responsibility for the welfare of one's expected child.

Specifically and most telling, Otakar knew where the mother lived but *never* went to her residence to speak to her directly and confront her about the welfare of his expected child. Moreover, he did not write to the mother about his concern for the welfare of his expected child; he did not contact the physician whom the mother had been seeing for prenatal care to obtain information and express his concern for the welfare of his expected child; he did not show any effort to participate in giving his expected child a first name or surname; and he did not consult a lawyer or any public legal agency to determine his rights and responsibilities as an unwed father with respect to the birth, care or custody of his expected child.

In addition, an unwed man who sincerely believes that he was one of the sexual partners to the physiological formation of a child may file a lawsuit to determine legally whether he is the father and assert his parental rights *before* the child is born. 750 ILCS 45/7 (West 1992). Otakar did not file such a lawsuit. Had he done so, he could have asserted his parental rights for Richard from the moment Richard was born. It is no excuse for Otakar to claim that he did not know the law, since he did not bother to seek legal advice.

Thus, the record clearly shows that although Daniella did not return Otakar's telephone calls shortly before Richard was born, ****655 ***318** Otakar was content "to just let his child be born" without any interest, concern or responsibility as to the care, custody or welfare of the child. This fact goes to the weight and credence of the testimony and evidence as to what occurred within the first 30 days after the birth of Richard.

***416** Otakar's conduct within the first 30 days after Richard was born is consistent with his lack of interest and concern shortly before Richard was born. Otakar claims that on March 16, 1991, the day Richard was born, he went to St. Joseph's Hospital and was told that Daniella had not checked into the hospital that day. He checked with St. Joseph's Hospital for several days and each time he was told that the hospital had no record of a Daniella Janikova.

On March 20, 1991, Otakar spoke with Daniella's uncle on the telephone and Otakar was told that the baby had died three days after birth. Otakar spoke to Daniella's uncle subsequently on two other occasions and on each occasion the uncle told Otakar that the baby had died. On or about March 26, 1991, however, Otakar telephoned Daniella's uncle and left a message on the answering machine stating that he did not believe that the baby died.

Otakar claims that on several occasions he went to Daniella's uncle's house, where Daniella was living, and looked into Daniella's car to see if there were any objects that would ordinarily be used by an infant. He also went through the garbage cans at the curb of the house looking for diapers or other objects that might be used by a baby. In addition, Otakar claims that he made inquiries at a few hospitals to see if Daniella had been admitted. He also claims that he had some mutual friends attempt to speak to Daniella on his behalf, and that some friends aided him in searching through official public records for birth or death certificates.

There is no evidence that Otakar did anything else until May 12, 1991, or the first 57 days after Richard was born, to determine

whether Richard was living or dead. Specifically, Otakar did not go to the mother's residence to speak to her directly and confront her about the birth, care, custody or possible death and funeral arrangements and burial of his child. Moreover, he did not write to the mother about the birth, care, custody or possible death and funeral arrangements and burial of his child; he did not contact the physician whom the mother had been seeing for prenatal care concerning the birth or possible death of his child; and he did not consult a lawyer or any public legal agency to determine his rights and responsibilities as an unwed father with respect to the birth, care, custody or possible death and funeral arrangements and burial of his child.

In addition, Otakar's self-serving statements about looking in the mother's car and in garbage cans lack credibility and are not convincing. The statements were not corroborated and they are inexplicable. According to Otakar, although he knew where she was living and was in front of her residence on several occasions, he never rang the mother's doorbell or knocked on her door to speak to her directly and confront her about the ***417** birth or death of the baby. Why would a father who was truly concerned about the life, welfare or death of his baby not have rung the doorbell or knocked on the door?

Judging from what Otakar did and did not do, Otakar was apparently content to go on with his life never truly knowing whether he had a child who was living or had a child who had died. Surely, the scant and churlish effort made by Otakar to discover whether his child was alive or dead does not demonstrate "a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first 30 days of its birth." 750 ILCS 50/1D(l) (West 1992).

Our conclusion is in accord with the conclusion of the guardian *ad litem* for Richard. The guardian *ad litem* participated in all of the lower court proceedings, including the trial. At the conclusion

of the evidence, the guardian *ad litem* advised the trial court as follows:

> "The legislature has acknowledged that all decisions under the Adoption Statute must keep an eye to what is in the child's best interest, but in weighing best interest, as counsel for the petitioner has argued, the Court cannot look at which home might **656 ***319 be a better home. That is not an issue. The Court must evaluate the statutes, however, with recognition of the fact that we are dealing with a baby here. We are not dealing with a trophy which is to be passed from person to person. We are dealing with a child who on account of the actions of the mother of the child was placed into a home straight from the hospital where that baby was born. That is a fact which was established by the evidence which was presented in this case.
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> I believe that the evidence which has been adduced before this Court has established by a clear and convincing standard that Mr. Kirchner is an unfit person under this section of the Adoption Act.
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> I believe consequently that the Court can determine that Mr. Kirchner is not required to consent to this adoption pursuant to the provisions of Chapter 40, Section 1510."

After a thorough review of the record, we agree with the statements and conclusion of the guardian *ad litem*.

We therefore affirm the judgment of adoption and the orders inherent to the validity of the judgment of adoption for the reasons that Otakar was an unfit person to have a child and his consent to

the adoption was not required. See 750 ILCS 50/8(a)(1), 50/14 (West 1992).

Finally, we are constrained to address another matter in this case. Richard's story is the account of a helpless child caught in the quagmire *418 of a judicial system that in attempting to resolve his problem became part of his problem. It has taken two years and five months for this case to sluggishly move through our judicial system. In a case of this nature, where plainly time is critical, it is a sad commentary on our judiciary.

It shamefully took one year and almost two months from the time that the petition for adoption was filed to the time that the judgment of adoption was entered. It has shamefully taken one year and three months from the time that the notice of appeal was filed to decide this case in the appellate court.[5]

It is surely imperative that the judiciary have enough judges and proper judicial case management in place at both the trial and appellate levels so that "time" does not become a factor in the decisional process of a case. Every effort must be made to see that we do not have any more cases in Illinois where it takes two years and five months to determine the lawful parentage of a young child. Moreover, the judiciary must come to grips with the fact that the psyche of our society can ill afford cases where children are "switched" parents after the first 18 months of their life.

Accordingly, the judgment of adoption and the orders inherent to the validity of the judgment of adoption are affirmed for the reasons stated.

AFFIRMED.

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[5] The attorneys are not blameless for the delay. No attorney in this case has ever filed a motion to advise the court of the exigent nature of the case or to have the case expedited. As a result, this case just "hung around" on the court's case calendar in the trial court and in the appellate court as if it were not a case involving an exigency.

CERDA, J., concurs.

TULLY, P.J., dissents.

Presiding Justice TULLY, dissenting:

The majority, in its misguided fervor to champion "injustice", has patently distorted and slanted the actual facts of this case on a number of important points. In fairness to the biological parents, as well as to Baby Richard, who will probably someday be confronted with the reality of his plight, the following clarifications are necessary to a just analysis of this case.

The majority somewhat misleadingly states: "Otakar did not see or speak to Daniella until May 12, 1991; he had not seen or spoken to Daniella since March 1, 1991." (254 Ill.App.3d at 409, 194 Ill.Dec. at 314, 627 N.E.2d at 651.) As will be explained below, he attempted to contact her on numerous occasions ***419** during the month of March *****320** and in ****657** fact did speak to her in the hospital on at least one occasion. Later the majority asserts: " * * * he did virtually nothing that a responsible unwed man would do if he expected that a woman would soon give birth to his child." (254 Ill.App.3d at 415, 194 Ill.Dec. at 317, 627 N.E.2d at 654.) In fact, Otakar attempted to send $500 to Daniella through their mutual friend, Selva, but Daniella refused the money. This would indicate a desire to provide for future financial arrangements, even after the baby's birth. Daniella had told Selva as well as other mutual friends that the baby had died at birth and they later repeated this to Otakar. Otakar also paid all pre-natal medical and living expenses and he arranged for delivery of the baby at St. Joseph's Hospital, which was conveniently located very near to the couple's apartment.

The majority repeatedly mentions Otakar's failure to make funeral and burial arrangements for the baby. (254 Ill.App.3d at 416, 194 Ill.Dec. at 318, 627 N.E.2d at 655.) As his testimony will show, Otakar did not really believe the baby had died, but on the other hand, he had no proof of the baby's existence and had not

the vaguest idea that the baby had been given away without his consent. Finally, in a most egregious departure from all evidence presented in the record, the majority declares: "Otakar was content to just let his child be born' without any interest, concern or responsibility * * * " (254 Ill.App.3d at 415, 194 Ill.Dec. at 318, 627 N.E.2d at 655) and "Otakar was apparently content to go on with his life never truly knowing whether he had a child who was living or had a child who had died." (254 Ill.App.3d at 417, 194 Ill.Dec. at 318, 627 N.E.2d at 655.) The following presentation of *all* the facts will clearly demonstrate that the majority in this case has employed judicial sophistry in creating an untruthful scenario of the "big, bad and unfit" biological father in this case.

I. STATEMENT OF FACTS

The birth mother, Daniella, was single and 24 years old at time of becoming pregnant. She immigrated to the U.S. from Czechoslovakia in August 1988 to live with her uncle. In November 1989, she began living with petitioner, Otakar, at his Lake Shore Drive apartment. She first found out she was pregnant in June 1990. Her due date, March 16, 1991, was also the eventual date of Baby Richard's birth. Otakar was informed of the baby's due date and delivery arrangements were scheduled for St. Joseph's Hospital in Chicago.

Otakar, also an immigrant from Czechoslovakia, returned to his homeland in January 1991 for two weeks in order to visit his ill grandmother. During this time, Daniella received a phone call from ***420** Otakar's aunt in Czechoslovakia informing Daniella that Otakar had resumed dating his former girlfriend, that they were still in love and acting as if they had never broken up. She reacted to this phone call by ripping up the marriage certificate, required for a marriage under Illinois law, and previously obtained by Daniella and Otakar. However, the marriage was delayed due to their conflicting work schedules. Daniella then gathered her belongings and moved from Otakar's apartment to a shelter for women in an apparent state of desperation and confusion.

At the time, she was eight months pregnant and not working. She spoke with a social worker, Ms. Scholes, who said she had two options: (1) put the baby up for adoption or (2) wait for the father to return and see what he says. She refused to disclose the name of the father to the social worker and told her that "she would lie" to the father in order to allow the adoption of the baby. This triggered the process which culminated in the destruction of the family planned by Daniella and Otakar. (Would not counseling have better helped Daniella to deal with this emotional period, rather than pressure from a social worker to consent to adoption?)

Daniella then met with the adoptive parents, the Does, and told them she wanted a two-parent family for her baby, because if she went back to Otakar it would be without a baby. She was then contacted by the Doe's attorney, Tom Panichi. Daniella told him she knew the name of the birth father but refused to give it because she did not want him to have any rights to the baby. She also informed Panichi that she planned ****658 ***321** to tell the father that the baby had died at birth. This encounter with Daniella should have been a warning signal to both Panichi and the Does of Daniella's dubious emotional state.

At this time, Daniella knew Otakar was back in the United States because she had called him at work. She called him on Valentine's Day 1991 and said: "I just want to remind you to call somebody who you love." She then hung up the phone without giving Otakar a chance to respond. She told the Does that Otakar had her number at the shelter and that she did not feel safe. This behavior would perhaps be indicative of a scorned, pregnant woman, who began to question her feelings for Otakar.

Thereafter, Daniella moved to her uncle's house in Hillside, Illinois. She called Otakar one day at work and met him later at a restaurant. Otakar knew she was living at her uncle's house. They met the next day at Otakar's apartment, where they attempted to reconcile and they engaged in sexual relations. Afterwards, Daniella became confused and told Otakar she did not know what

she wanted, as *421 far as a future with him or the baby. This further corroborated Daniella's then confused mental state.

After the birth of Baby Richard on March 16, 1991, she avoided Otakar and she refused to accept his phone calls. The baby was delivered at a hospital near the uncle's suburban home instead of St. Joseph's Hospital as planned. Otakar did not know where the baby was delivered and went to St. Joseph's Hospital in search of Daniella and the baby. Daniella told her uncle to tell Otakar that the baby had died and he obliged. She remained living at her uncle's house until May 12, 1991, when she resumed living with Otakar. At this time she confessed all of her prior falsehoods about the death of the baby and how she had consented to the baby's adoption.

On March 19, 1991, three days after Baby Richard's birth, the adopting parents, the Does, filed a petition to adopt Baby Richard, falsely alleging that the father of the baby was "unknown" and that the address of said father was unknown. In their amended petition to adopt, count I alleged that the parental rights of the natural mother, Daniella, were terminated on March 20, 1991 after she voluntarily consented to allow her son, born on March 16, 1991, to be adopted. Count I further alleged that the natural father, Otakar Kirchner, was an *"unfit parent"* under Section 1 of the Adoption Act (750 ILCS 50/1D(l), 50/14 (West 1992)) in that he: (a) failed to show a reasonable degree of interest in the child within the first 30 days of life; (b) abandoned the child; (c) engaged in open and notorious fornication. The fornication allegation was later dropped from the petition.

In the alternative, count I stated that Otakar's consent to the adoption was not necessary under Section 8 of the Adoption Act (750 ILCS 50/8 (West 1992)) in that:

(a) he was informed he was the father of the child;

(b) the child was placed for adoption under 6 months;

(c) and he failed to do at least one of the following:

(1) openly live with the child for at least one half length of the child's life prior to adoption;

(2) openly hold himself out to be the father during such period of time; or

(3) pay a fair and reasonable sum for medical expenses.

At the adoption hearing, counsel for the Does made the following arguments: Otakar did not: (1) live with child; (2) hold himself out as the father and (3) did not pay reasonable medical expenses. They also alleged that Otakar did not: (1) show a reasonable degree of interest in Baby Richard within 30 days of birth; and (2) abandoned Baby Richard. Counsel also argued that the fact he married the birth ***422** mother six months later did not in any way affect whether he was fit or showed a reasonable degree of interest within the first 30 days of the baby's life.

Otakar asserted an affirmative defense under the Adoption Act, which provides that impediments beyond a father's control are a defense to his showing a reasonable degree of interest in the child within 30 days after birth. Specifically, Otakar asserted as a defense the deception of the birth mother in ****659 ***322** representing to Otakar that Baby Richard had died at birth and in hindering all contact with her after the birth of Baby Richard. Upon finding out about the adoption on May 12, 1991, Otakar contacted an attorney and promptly moved on June 6, 1991, filing an appearance challenging the adoption of his infant son by the Does. Thus, Otakar exhibited a "reasonable degree of interest" in his child within 30 days of finding out about the existence of the child as well as his adoption, and after the impediment had been removed.

Otakar testified that during eight months of Daniella's pregnancy, prior to her leaving his apartment, he paid for all household expenses and maternity clothes and other expenses relating to the pregnancy. Moreover, he fully supported Daniella so that she did not have to work during the pregnancy. During his first week in Czechoslovakia, he and Daniella talked to each other

every day, then Daniella stopped answering the telephone. During their final overseas phone conversation, Daniella accused Otakar of honeymooning with his ex-girlfriend. When he returned to his apartment in Chicago, the keys and a torn-up marriage license were thrown on a table. She had never told him she was considering adoption. He had recently allowed her to purchase a car on his credit card. They got back together for a day at Otakar's apartment and Daniella "was talking like nothing had happened." Otakar listened to the baby moving inside and they discussed the baby's birth. The next day she called him at work and said she did not know her feelings toward him. Then she said she did not want to see or talk to Otakar anymore. This was sometime around February 28th, just two weeks before Baby Richard's birth.

On the due date, March 16th, Otakar called St. Joseph's Hospital and went there personally looking for Daniella but she was not there. On March 20, four days after the baby's due date, Otakar spoke with the uncle who said the baby had died. He had absolutely no knowledge of the adoption or Daniella's plans to consent to adoption. At the end of March, he left a message on the answering machine at her uncle's house that he did not believe that the baby had died. He then started driving to the uncle's house everyday looking for evidence of *423 a baby. On at least one occasion he was stopped by police and questioned about his loitering around the uncle's house.

A customer from the restaurant, managed by Otakar, contacted Senator Paul Simon's office to find out if a death certificate had been issued on the baby, but the search was only valid for the City of Chicago, not the suburbs, where the baby was delivered. Otakar also testified that other friends confirmed Daniella's story that the baby had died.

Otakar tried calling Daniella four or five times a day but she would not pick up the phone. He also tried sending her $500 in cash through their mutual friend, Selva. He did not speak to her again until after the baby was born around March 25th, when he

talked to her briefly in the hospital. (Apparently, Daniella had called him from the hospital, but Otakar did not know which one.)

The attorney who handled the adoption for the Does, Tom Panichi, testified that he knew that Daniella was reluctant to furnish the name of the birth father. He also knew she had continued contacts with the father and that she was planning to tell the birth father that the baby had died. She even asked Panichi if he could help in her scheme to falsify a death certificate for the baby. Daniella later told the Does that she thought a child should be raised by a two-parent family.

It should be noted that under Illinois law, in order to serve notice of an adoption to the father by publication, the attorney must inquire as to the address of the father. Panichi signed a notarized "Affidavit For Service By Publication" wherein he stated under oath that the father "on due inquiry cannot be found so that process cannot be served upon defendant." Panichi later testified that he failed to make any effort to ascertain the address of Otakar, who was then still living in the same apartment on Lake Shore Drive. He never asked Daniella about her address prior to living with her uncle. Daniella also told Panichi that the birth father would never consent to an adoption, whereupon Panichi told her the only other "remedy" would be to find unfitness. Panichi testified: "[Daniella] **660 ***323 led us to believe that she was going to be able to control [Otakar] for not coming forward by still secreting the birth and the whereabouts [of the baby.]"

When the Does filed their petition for adoption they alleged that "the biological father is unknown" and that "the address of said father is unknown." Subsequently, the Does filed their "Amendment To Supplement Petition For Adoption" wherein they again asserted that the father was unknown and his whereabouts were then unknown. The first petition was personally signed by the Does and the amended *424 petition was signed by the Does's attorney, Panichi, on their behalf. At this time, both the Does and their attorney knew this to be untruthful. They had both been told

by Daniella that she knew the name of the father and his whereabouts. Hence, the adoption petition filed was fraudulent and illegal and the subsequent adoption decree entered thereon was void. During the initial adoption hearing, prior to Otakar's involvement in the case, Daniella informed the court that she did not know the identity of Baby Richard's father. This was stated in the presence of the Does and their attorney, all of whom knew this to be false.

Daniella's Uncle Joe testified and corroborated the stories of both Daniella and Otakar. Daniella originally lived with him prior to moving out to live with Otakar. Sometime in February 1991, Daniella returned to live with him, during which time she delivered a baby. He knew that the baby was born alive and had not died. He never saw the father, Otakar, inside or outside of his house. After the baby was born, at the request of Daniella, Uncle Joe told Otakar that the baby had died. Otakar left several messages on the answering machine at the uncle's house, but Daniella refused to take Otakar's calls.

The couple's mutual friend, Selva, testified that she worked in the pastry shop at the restaurant complex managed by Otakar and she knew about the baby as well as about the birth arrangements at St. Joseph's Hospital. She did not know that Daniella wanted to put the baby up for adoption. Prior to the birth of the baby, Otakar gave Selva $500 to give to Daniella, but Daniella refused to take it. She did not talk to Daniella again until May 9, 1991, when Daniella came over to Selva's house to tell her the truth about the baby and that she had consented to adoption. Selva then went to Otakar's place of business and told him about the adoption. On May 12, 1991, Daniella moved back to Otakar's apartment and explained to him what had happened with the baby.

II. FINDINGS OF THE TRIAL COURT

At the close of the adopting parents' case, counsel for Otakar moved for a directed verdict based upon the failure of the Does to present clear and convincing evidence of unfitness by the birth

father. He argued that if the failure of a person to show a reasonable degree of interest in the child under the Adoption Act is caused by impediments beyond the person's control, this constitutes an affirmative defense to the charge of "unfitness." The motion was denied.

At the conclusion of all the evidence, the trial judge declared Otakar an "unfit parent" partially based upon the fact that Otakar had ***425** travelled to his homeland for a brief period in January 1991. However, he returned to the U.S. one and one-half months prior to the birth of Baby Richard. The trial judge also found Otakar "unfit" because he should have been seeking legal advice when instead he was trying to make contact with the birth mother. On May 8, 1992, Otakar's parental rights were terminated based upon his unfitness and the adoption decree favoring the Does was entered on May 12, 1992.

The trial judge apparently did not take into consideration the fact that Otakar was hindered from showing an interest in the baby within the first 30 days of birth *as a result of* the scheme propagated by Daniella. Moreover, it should be noted that both the adopting parents, their lawyer and the social worker who arranged this adoption were all aware of Daniella's "plan" to defraud Otakar of his rights to the baby and that she was well aware of his location at all times pending the adoption proceedings. Yet no effort was made by the adopting parents, their attorney or the trial court to locate the biological father in this case. Upon discovering the adoption, Otakar promptly moved within the statutory 30-day period to challenge the ****661 ***324** adoption and assert his rights as the biological father of the child.

Although Illinois courts have considered the best interests of the child in cases such as this, courts have deferred in the first instance to the relationship between parent and child in both custody and guardianship proceedings. (*In re Custody of Townsend* (1981), 86 Ill.2d 502, 56 Ill.Dec. 685, 427 N.E.2d 1231; *People ex rel. Edwards v. Livingston* (1969), 42 Ill.2d 201, 247 N.E.2d 417.) In

Townsend, the supreme court required that a third-party seeking to obtain custody of a child to demonstrate "good cause or reason to overcome the presumption that a parent has a superior right to custody and further to show that it is in the child's best interests that the third-party be awarded the care, custody and control of the minor." (*Townsend*, 86 Ill.2d at 510-11, 56 Ill.Dec. at 689-90, 427 N.E.2d at 1235- 36.) The phrase to "demonstrate good cause or reason to overcome the presumption that a parent has a superior right to custody" is legally equivalent to requiring a demonstration that a parent is not "fit." *In re Estate of Brown* (1990), 207 Ill.App.3d 139, 152 Ill.Dec. 70, 565 N.E.2d 312.

While it is true, as the majority argues, that the "superior rights doctrine" is an archaic rule of law emanating from a societal view of children as chattel, this doctrine has not been completely obliterated by the "best interests standard" promulgated by the majority. Instead, the presumption favoring biological parents is to be considered in light of *all relevant factors* in determining what is in the best interests of the child. In other words, a natural parent may be required to ***426** yield custody rights only where the best interests of the child would be served. (*Townsend*, 86 Ill.2d at 508-09, 56 Ill.Dec. at 688-89, 427 N.E.2d at 1234-35; *Livingston*, 42 Ill.2d at 208-210, 247 N.E.2d at 421-22; *see also In re Estate of Becton* (1985), 130 Ill.App.3d 763, 86 Ill.Dec. 121, 474 N.E.2d 1318.) In *Becton*, the court held that the third-party must establish good cause or reason to overcome the presumption in favor of the natural parents. Among the factors courts should consider are: the sufficiency of the parent's home, its surroundings, the attachment of the child to a third-party and the happiness, security and comfort of the child. *In re Custody of Henkins* (1983), 117 Ill.App.3d 666, 72 Ill.Dec. 773, 453 N.E.2d 78.

The majority cites *In re Ashley K.* (1991), 212 Ill.App.3d 849, 879, 156 Ill.Dec. 925, 571 N.E.2d 905, in support of its "best interests analysis" wherein Justice Rizzi wrote for the majority:

> "A child's best interest is not part of an equation. It is not to be balanced against any other interest. In custody cases, a child's best interest is and must remain inviolate and impregnable from all other factors, including the interests of the biological parents." (*Ashley K.*, 212 Ill.App.3d at 879, 156 Ill.Dec. at 943, 571 N.E.2d at 923.)

It is interesting to note that in the earlier case of *Montgomery v. Roudez* (1987), 156 Ill.App.3d 262, 108 Ill.Dec. 803, 509 N.E.2d 499, Justice Rizzi wrote:

> *"A finding of unfitness cannot be based solely on a lack of continuous contact between a parent and her child.* Moreover, we have examined the interaction between plaintiff and [her child] and find nothing in the record to support a finding of parental unfitness on plaintiff's part. Clearly, a parent is not unfit in the usual sense of the word because she has faults or would be found lacking as an ideal parent.
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> Fitness of a parent is only one of the factors to be considered in determining how the best interests of a child will be served. * * * Plaintiff also argues that her superior right to custody of [her child] was not overcome by any good cause or reason sufficient to require an award of custody [to a third-party non-parent.]" *Montgomery*, 156 Ill.App.3d at 266, 108 Ill.Dec. at 806, 509 N.E.2d at 502. (Emphasis added.)

Justice Rizzi further explained that there are "many factors" to be considered in determining which custodial arrangement will best serve the interests of the child, including: (1) the wishes of the child; (2) the sufficiency and stability of the respective homes and surroundings of the parties; (3) the interaction ****662 ***325** and relationship between the ***427** parent and child; (4) the child's

adjustment to his home; and (5) the mental and physical health of the parties involved. *Montgomery*, 156 Ill.App.3d at 267, 108 Ill.Dec. at 807, 509 N.E.2d at 503.

I initially note that the case of *Ashley K.* relied upon by the majority, interestingly enough involved a set of natural parents, both of whom were proven drug addicts, the biological mother was a known prostitute and Ashley was removed from their care due to proven neglect. Thus, *Ashley K.* is clearly distinguishable on its facts from the case *sub judice*. Secondly, in the instant case, there was no evidence presented to the trial court on the adoptive parents, in order to provide for a proper "best interests" analysis. The only evidence in the record indicating the "fitness" of the Does is that they defrauded the court by knowingly acceding to an adoption where they knew the natural father had been deprived of any rights. It is interesting to note that in the majority opinion Justice Rizzi has failed to apply the multi-factor balancing test indigenous to a best interests analysis. To do so would be to admit that a best interests analysis was never performed by the trial court in this case. Moreover, in their appellate briefs and during oral argument before this court, no evidence was presented by counsel for either party regarding the best interests of Baby Richard.

The entire finding of unfitness in this instance rests upon the trial judge's finding that Otakar should have contacted a lawyer within 30 days of the due date instead of trying to make contact with the birth mother and searching through her garbage for evidence that the child was in fact alive. As Justice Rizzi stated in *Montgomery* (156 Ill.App.3d 262, 108 Ill.Dec. 803, 509 N.E.2d 499): "*A finding of unfitness cannot be based solely on a lack of continuous contact between a parent and her child.*" (Emphasis added.) Nevertheless, the entire majority decision rests upon the fact that the biological parents have had no contact with Baby Richard since his birth. This must be the case since no evidentiary hearing was held on the many factors which may affect the best interests of Richard. Nothing in the record reflects the current care

and security of Richard, the background of the Does or even the long-term and latent psychological effects on Baby Richard when he realizes the course of events which led to the termination of his natural father's parental rights.

In addition to state created rights, there are certain Constitutional safeguards relating to the family. The Supreme Court first extended Constitutional protection to the parent-child relationship in 1923 when it explained that although no exact definition of the liberty guaranteed by the fourteenth amendment existed, "without doubt * * * it denotes the right of the individual to contract, to engage in any of ***428** the common occupations of life, to acquire useful knowledge, to marry, establish a home *and bring up children.*" (*Meyer v. Nebraska* (1923), 262 U .S. 390, 43 S.Ct. 625, 67 L.Ed. 1042.) In 1944, the Court recognized that society has an interest in protecting the welfare of all children: "it is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." (*Prince v. Massachusetts* (1944), 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645.) Finally, in 1974, the Supreme Court held: "this Court had long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." (*Cleveland Bd. of Ed. v. LaFleur* (1974), 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52.) Although the Court has never addressed third-party custody disputes directly, *Carey v. Population Serv. Int'l* (1977), 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675, extended the right of privacy to include the use of contraception to all persons, married or unmarried, since individuals have *a fundamental right in deciding to bear and beget a child.* The Court also accorded great deference to the parent-child relationship in *Parham v. J.R.* (1979), 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101.

Many other jurisdictions have rendered decisions purely on the basis of biological relations. (*See, Roche v. Roche* (1944), 25 Cal.2d 141, 152 P.2d 999 ("One of the natural **663 ***326 rights incident to parenthood ... is the right to care and custody of a minor child."); *In re J.C.P.* (1983), 167 Ga.App. 572, 307 S.E.2d 1, (Only where compelling circumstances are found to exist by clear and convincing proof may a court sever the child-parent custodial relationship).) At least seven states clearly apply a parental rights standard to third-party custody disputes. *See In re D.A. McW.* (Fla.1984), 460 So.2d 368; *Blackburn v. Blackburn* (1982), 249 Ga. 689, 292 S.E.2d 821; *McGregor v. Phillips* (1975), 96 Idaho 779, 537 P.2d 59; *Sheppard v. Sheppard* (1981), 230 Kan. 146, 630 P.2d 1121; *Pierce v. Pierce* (1982), 198 Mont. 255, 645 P.2d 1353; *In re Grover* (Okla.1984), 681 P.2d 81; *Cyphers v. Cyphers* (1983), 172 W.Va. 280, 304 S.E.2d 866.

In the recent Michigan decision of *In re Clausen* (1993), 442 Mich. 648, 502 N.W.2d 649, which has become a *cause celebre*, the biological mother incorrectly listed the wrong father's name during the adoption proceedings. While the adoption was pending the true biological father was discovered and proven through blood tests. The father then promptly moved to invalidate *429 the adoption. Following a bench trial, the Iowa district court found that the father had established by a preponderance of the evidence that he was the biological father, that the adopting parents had failed to establish by clear and convincing evidence that he had abandoned the child or that his rights had been terminated and that a "best interests" analysis was not appropriate since abandonment was not established. The Michigan Supreme Court later affirmed the decision and the baby, Jessica, was returned to her biological parents. At the end of the proceedings, Jessica was two and one-half years of age.

Similarly, in the instant case, the father, Otakar, was unaware of the birth of his child until more than 30 days after his birth. It must be reiterated that the adopting parents and their attorney knew

that the father could be located, but no attempt was made to do so. Moreover, Daniella told their lawyer of her plans to tell Otakar that the baby had died. While we should not totally discount the best interests of the child in this case, we cannot ignore the gross injustice perpetrated upon the biological father in this instance. This is not a case of a disinterested father or a man intending to leave his girlfriend "in the lurch." He lived with and cared for Daniella throughout her pregnancy, paying for all rent, food and medical necessities. He also made delivery arrangements for Baby Richard. It was only as a result of the meddling of Otakar's relatives that the relationship between the biological parents became severed. Daniella decisively and improvidently reacted to the hearsay information that Otakar was seeing his former girlfriend. It has been medically proven that women often react in an unusually emotional and volatile manner even to ordinary everyday occurrences during pre-natal and post-natal care, much less such a severe blow dealt to her in her eighth month of pregnancy. There is no evidence in the record that the information given to Daniella was even remotely true and it seems extremely doubtful given their subsequent reconciliation.

The interests of the child are but one factor to be considered in a case of such a delicate nature. We must consider the effect on the child who will one day learn that his biological father was defrauded and prevented of any opportunity to win his custody in a scheme which involved the adopting parents and their attorney, not just the biological mother. Moreover, during the initial adoption hearing, the trial court did not require any proof of the biological father or his whereabouts. If there is no law requiring such an investigation, then the law must be changed. The potential damage of allowing the birth mother to solely control the termination of parental rights is immeasurable and the social costs too great. Even the biological mother herself ***430** is a sorry victim in this case. Her actions were entirely instigated by the interference of Otakar's relatives and a vicious unproven rumor which called into question her future relationship with Otakar and her prospective

ability to care for the baby as a single mother and as a new immigrant in a foreign culture. This is not the case of a biological mother who had numerous bedfellows, hindering proper identification of the father, as was the case in *In re Clausen*.

**664 ***327 The statutory language cited by the majority regarding a disposition hearing within 18 months of a custody transfer may prove adequate for certain foster care situations, but it is not really sufficient to remedy the tragedy of this case and the many others which may follow. The laws regarding parental termination based upon a finding of unfitness or abandonment within the first 30 days of birth were originally written to protect women at a time in our history when single mothers were deserted or abandoned after impregnation and out of a lack of economic resources and societal taboos were forced to sign away their parental rights to a "proper family." We are now living, for better or for worse, in the era of Murphy Brown, where many women are choosing single motherhood and either deserting the natural father or abrogating any rights of the father by signing adoption consents or raising the child without ever informing the father of his legal status. This presents a potentially tragic situation for the unknowing natural father as well as any future adoptive parents, not to mention the child who is forever affected by the *imbroglio*, regardless of the outcome.

The majority consoles itself with the demise of the *Dred Scott* decision and the passing of an era when children were treated as chattel. Yet the fervent cries of all parties involved--"This is my child! Hew it in half it you must, but give me my share!"--strongly suggest that children are still being treated as chattel. Only the legal rhetoric has changed, as per the majority viewpoint in this case.

First and foremost, laws are needed mandating a good-faith investigation into the identity and location of the biological father prior to the finalization of any adoption. Severe sanctions should be imposed upon parties and their counsel for concealing

information regarding the whereabouts of the natural father. Secondly, the time period within which the natural father may assert his rights must be limited to a fixed period of time, for example, no more than 30 days from the birth of the child, unless he possesses an affirmative defense, but in no case should this period be extended beyond 120 days. Finally, any assertion of parental rights within this time period should mandate an emergency hearing on the best interests of the child's disposition which would encompass the rights of the biological *431 parent who had not terminated his parental rights. Within 30 days of this hearing, an expedited appeal should be filed and scheduled for immediate hearing and an expedited ruling. The entire process should take no more than six months, unlike the instant case, where the process took two and one-half years. If this had been the law, we would now be deciding the fate of a six-month old infant and not that of a two and one-half year old toddler.[1]

The natural father in this case did what a reasonable man could be expected to do within the first 30 days of Baby Richard's life. Through the entire pre- and post-natal period, he held himself out as the father of Baby Richard, he never abandoned the baby and he even begged Daniella's uncle for information about the baby, culminating in his desperate search through garbage cans for discarded diapers or formula. One can visualize the pain and anguish this father was experiencing. One would not expect him to immediately run to an attorney at this point, when he had still hoped for an amicable reunion with Daniella. We have here two young people from a foreign country thrust into a situation where they were in love, but due to the interference of family and "well-meaning" social agencies, they end up losing legal right to

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[1] When no one person has cared for an infant for more than a few months, the child should not yet have developed a dependency on any one person at the time of placement. Thus, placing the infant in a new setting should not have an adverse impact on him. See J. Bowlby, *Attachment and Loss* 222-23, 228 (1969); R. Patton, *Growth Failure in Maternal Deprivation* 38 (1963).

their child. This case is not so different from the concepts promulgated by the Third Reich when it ruthlessly selected children at random and informed parents: "This child may live, but this other child must be forever removed because of religion or ethnic origin."

We are so overwrought by "pop culture" values in our society that we can allow, without hesitating, the concept now being promulgated, without a loud cry of "Something is wrong here." This child should be reunited with his biological parents. The mish-**665 ***328 mash that society has somehow created in the year 1993 goes against core Judeo-Christian principles, which for thousands of years have supported the family unit above all else. Moreover, this concept is universal and transcends all national, ethnic and religious lines.[2] We are now elevating social workers, attorneys and media reaction above familial rights to determine the best interests of children.

*432 Hypothetically, what happens if the adoptive family unit fails? What if the Does subsequently divorce? What if the adopting couple experiences emotional and physical crises? Will there come a time when Richard will discover his biological parents fought for his return for the first two and one-half years of his life?

If there is a voice in the wilderness crying out, it is the voice of law and reason. Our society has been founded on the concepts of family and freedom under the law for all. Without families and without biological parents, society must fail. There exists no stronger tie than the blending of two human beings, resulting in the

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[2] "When the family is ruined, the timeless laws of family duty perish; and when duty is lost, chaos overwhelms the family

* * *

The sins of men who violate the family create disorder in society that undermines the constant laws of * * * family duty. * * * [W]e have heard that a place in hell is reserved for men who undermine family duties." (*Bhagavad-Gita* 10:40, 10:43, 10:44; Hindu scriptures, 1st century, A.D.)

creation of another human life. Obviously, there are thousands of unfit biological parents who ought not raise children. The tragic case of Baby Jessica in Michigan may be one such example. Where was the caring biological father in the *Clausen* case? In that instance, the court refused to apply a best interests analysis because it found that the biological father had never abandoned his child. As a result, two loving, adoptive parents have been destroyed. I am not suggesting that this should be the law in Illinois. I agree with the majority that the best interests of the baby must prevail, but only after a hearing of all evidence relevant to the child's future welfare. In this case, no such analysis was ever performed by the trial court. On appeal, the majority has created its own best interests analysis, and based upon the evidence presented in the record, the majority has reached an erroneous result.

Unlike the Baby Jessica case, this case involves two loving biological parents who remained together except for the brief period of time when Daniella became confused about her relationship. It was during this period that she signed her baby away. Otakar's rights were never protected. He never left her. He provided for her support throughout the pregnancy and even tried to send her money through an intermediary. He pled with her uncle to speak with Daniella and even searched through garbage cans for evidence of the child. He did everything a reasonable person could have done except obtain the services of an attorney. However, within the first 30 days of Baby Richard's life, Otakar did not know the adoption process had commenced. The attorney for the Does could have easily ascertained the whereabouts of Otakar and yet he filed an adoption petition alleging that the biological father was "unknown." In so doing, the Does and their attorney filed a patently false document. A judgment for adoption cannot be entered on the basis of a false or fraudulent petition. Hence, this case warrants an outright reversal of the trial court's ruling, but at the very least, it should be remanded *433 for a hearing and presentation of expert testimony in order to determine the best interests of Baby Richard.

The majority's concern with the separation of Baby Richard from his adoptive parents is understandable, but an abrupt termination of the Does's custody rights is not the only available remedy. Obviously, Baby Richard has formed "affection relations" or a "psychological relationship" with his adoptive parents. However, researchers have found that a child may enjoy more than one affection relationship.[3] A child applies what he or she has gained from the first affection relationship to later relationships with other individuals who give the child a similar amount of love, affection and attention. The affection relationship is not the sole province of the **666 ***329 psychological parent. Other persons who offer emotional support to the child can equally form an affection relationship with him. In addition, the order reversing an adoption, in a case such as this, could provide visitation rights to the adoptive parents for a limited period of time, in order to reduce the risk of psychological trauma caused by an abrupt severance and to help the child adjust to his new surroundings.[4]

There is no doubt that the rights of the biological parents were improperly obliterated by the lower court. The charade of terming the father "unfit" because he failed to immediately seek legal advice is preposterous and an insidious appendix to the already confused state of the law in such cases. If the biological father did not know when or where the child was born, when did the 30-day period for measuring fitness begin to run? If Otakar was informed the child had died, then the 30-day period could not have begun until May

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[3] See Note, *Adoption--Psychological v. Biological Parenthood in Determining the Best Interests of the Child*, 3 Seton Hall L.Rev. 130, 140 (1971).

[4] It is quite difficult and often ill-advised for the new family to deny the existence of the child's previous family. Post-judgment visitation by the adoptive parents could facilitate the child's development and integration into his "new" family. Of course, the court would have to consider all relevant factors in determining if post-judgment visitation would be in the best interests of the child and, if so, it would establish an appropriate visitation scheme. *See* Note, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. Rev. 633 (1984).

12, almost two months after the baby's birth, when Daniella informed Otakar of the adoption. Until this point, there existed an impediment to Otakar exhibiting a reasonable degree of interest in Baby Richard. A proper application of the law would have recognized this impediment as an affirmative defense, based upon the ***434** unique facts of this case. Based upon all of the foregoing, this adoption was improper, illegal and fraudulent and it should be vacated by this court.

Finally, if the majority wishes to solely base its opinion upon the "best interests" of the child then at the very least a "best interests" hearing should be held in order to consider all factors affecting the child's future welfare, including: (1) the wishes of the child; (2) the sufficiency and stability of the respective homes and surroundings of the parties; (3) the interaction and relationship between the parent and child; (4) the child's adjustment to his present home; (5) the mental and physical health of the parties involved. In addition, in this case, the "best interests" analysis must also weigh the apparent fraud of the adopting parents and their attorney; the volatile emotional state of the biological mother at the time of her initial consent to the adoption; and the apparent legitimate concern of the biological father, whose parental rights were terminated due to a finding of "unfitness." No evidence was presented to the trial court or to this court specifically concerning the best interests of Baby Richard. In any case, the best interests view adopted by this court must not be construed to lessen the vitality, integrity or stability of the biological family unit.

It is interesting that the majority, without blinking, has deemed itself all- knowing in this instance and has assumed a sacrosanct role formerly reserved for Divine Providence. The tradition of adoption in our society was created in order to provide a place of love and care for abandoned, unwanted and orphaned children. Baby Richard was never abandoned or unwanted. American society should not be so devoid of humanity, fairness and just plain good common sense.

For all of the aforementioned reasons, I respectfully dissent from the majority view.

Attorney No. 90340

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - COUNTY DIVISION

IN THE MATTER OF	)	
THE PETITION OF	)	
[JOHN DOE AND JANE DOE]	)	
	)	
	)	
TO ADOPT	)	No. 91 CoA 364
	)	
BABY BOY JANIKOVA,	)	
	)	
A MINOR.	)	

JUDGMENT ORDER OF ADOPTION

THIS CAUSE coming on to be heard on the petition for adoption; the consent of the mother of the minor; the answer of the Guardian ad Litem of the child sought to be adopted; and the investigator heretofore appointed by this Court having presented its report in writing; and,

IT APPEARING TO THE COURT that the return date designated in the summons has passed, and that notice for the entry of this Judgment has been given to all necessary parties;

THE COURT, having heard all the evidence and now being fully advised in the premises, FINDS:

1. That is has jurisdiction of the parties to this cause and the subject matter hereof;

2. That the petitioners herein and the child sought to be adopted are personally present in open court;

3. That the petitioners are husband and wife, of lawful age and under no legal disability; that they reside in Schaumburg, Cook County, Illinois; and that they have resided in Illinois for a period

in excess of six (6) months immediately preceding the filing of the petition for adoption;

4. That the petitioners desire to adopt BABY BOY JANIKOVA, a male minor born on March 16, 1991, in Elk Grove Village, Cook County, Illinois; and that the petitioners are not related to the child;

5. That the mother of the minor consented in writing to the adoption of her child; and that her consent was acknowledged as required by law and is valid;

6. That on March 20, 1991, the petitioners acquired custody of the minor in accordance with a Court Order; and that the child has resided with the petitioners since said date, a period in excess of six (6) months since the entry of the Interim Order granting temporary legal custody of the child to the petitioners;

7. That no orders have been entered in any court affecting the custody or adoption of the minor, or the adoptive, custodial or parental rights of the petitioners to the child, except the Orders heretofore entered in this proceeding terminating the parental rights of the parents to the minor;

8. That the petitioners are reputable persons of good moral character, with sufficient ability and means to rear, nurture and educate the minor in a suitable and proper manner;

9. That the allegations of the petition for adoption are true and proven as therein alleged; and that it is fit and proper and for the best welfare and interests of the child that the prayer of the petition for adoption be granted;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that from this day the minor shall, to all legal intents and purposes, be the child of the petitioners and, for the purpose of inheritance and all other legal incidents and consequences, the same as if born to them of their marriage;

IT IS FURTHER ORDERED that the name of BABY BOY JANIKOVA be, and it is hereby changed to

IT IS FURTHER ORDERED that the Clerk of this Court shall issue to the petitioners, or their attorney, one or more certified copies of this Judgment Order of Adoption.

ENTER: /s/ JUDGE EUGENE L. WACHOWSKI
JUDGE

May 13, 1992

Circuit Court 0078

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Attorney #13014
STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - COUNTY DIVISION

IN RE: THE MATTER OF	)	
	)	
Husband and Wife,	)	
	)	
	)	
to adopt	)	No. 91 COA 364
	)	
	)	
a Minor.	)	

APPEARANCE

THE UNDERSIGNED does hereby enter the Appearance of OTTO KIRCHNER in the above-captioned matter.

/s/ Loren L. Heinemann
Attorney for OTTO KIRCHNER

Attorney Code #13014
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(708) 361-4200

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - COUNTY DIVISION

IN RE: THE MATTER OF	)	
	)	
JOHN DOE & JANE DOE	)	
	)	
Husband and Wife	)	
	)	
to adopt	)	No. 91 COA 364
	)	
BABY DOE,	)	
	)	
A Minor.	)	

NOTICE OF MOTION

TO: THOMAWS PANICHI, 18225 Burnham Ave.,
Lansing, Il 60438

ON June 13, 1991, at 9:30 a.m., or as soon thereafter as counsel may be heard, I shall present the **MOTION FOR LEAVE TO FILE ANSWER** attached hereto before the Honorable Judge then and there sitting in Room 1703, Daley Center, Chicago, IL.

Attorney Signature: /s/ Loren L. Heinemann
LOREN L. HEINEMANN
Attorney for Petitioner, OTAKAR KIRCHNER
12413 S. Harlem Ave.
Palos Heights, IL 60463
(708) 361-4200
Attorney # 13014

==========

CERTIFICATE OF DELIVER (PERSONALLY OR BY MAIL)

THE UNDERSIGNED hereby certifies, under penalties of perjury as provided by law pursuant to Ill.Rev.Stat., c. 110, sec. 1-109, that the above notice and any attached pleadings were ___ personally delivered or _x_ placed in the U.S. Mail properly addresses, with first class postage prepaid, to the parties at the addresses set forth above on/before 5:00 p.m. on June ___, 1991.

_____ ESTHER ROTH

Signature Print Name

Attorney # 13014
STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - COUNTY DIVISION

IN RE: THE MATTER OF	)	
	)	
JOHN DOE & JANE DOE	)	
	)	
Husband and Wife	)	
	)	
to adopt	)	No. 91 COA 364
	)	
BABY DOE,	)	
	)	
A Minor.	)	

MOTION FOR LEAVE TO FILE ANSWER

NOW COMES the Petitioner, OTAKAR KIRCHNER, by and through his attorney, LOREN L. HEINEMANN, and does hereby move this Honorable Court to enter an order granting Petitioner leave to file his answer herein, to set a discovery schedule and set a trial date hereon and for any other and further releif as may be appropriate.

/s/ Loren L. Heinemann
LOREN L. HEINEMANN,
Attorney for Petitioner

Attorney Code #13014
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12413 S. Harlem Ave.
Palos Heights, IL 60463
(708) 361-4200

MAY 5 1995

No. 94-1644 and 94-9087

IN THE

Supreme Court of the United States

October Term, 1994

BABY "RICHARD," a minor, by his guardian *ad litem*, Edward J. O'Connell, and JOHN and JANE DOE, Former adoptive parents of the child Richard,

Petitioners,

v.

OTAKAR KIRCHNER, Biological father of the child Richard,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE AS *AMICUS* AND BRIEF OF THE GOVERNOR OF THE STATE OF ILLINOIS AS *AMICUS* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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Special Assistant Attorneys General
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State of Illinois

*Counsel of Record for *Amicus*

Dated: May 5, 1995

Nos. 94-1644 and 94-9087

IN THE

Supreme Court of the United States

October Term, 1994

BABY "RICHARD," a minor, by his guardian *ad litem*, Edward J. O'Connell, and JOHN AND JANE DOE, Former adoptive parents of the child Richard,

Petitioners.

v.

OTAKAR KIRCHNER, Biological father of the child Richard,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

MOTION OF THE GOVERNOR OF THE STATE OF ILLINOIS FOR LEAVE TO FILE A BRIEF AS *AMICUS* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

The Governor of the State of Illinois, Jim Edgar, respectfully moves this Court to grant leave to file the attached *amicus* brief in support of the petitions for writ of certiorari to the Supreme Court of Illinois. In support of this motion, the Governor states as follows:

1. Consent to file has been respectfully requested of each of the parties. Only Respondent, Otakar Kirchner, refused to consent.

2. As the chief executive officer of Illinois, it is the Governor's responsibility to faithfully execute the laws and public policies of the State. The decision of the Illinois Supreme Court in this case wrongly held that a custody hearing following a failed adoption, provided for by the State pursuant to long-standing precedent and legisla-

tion, violated the federal Constitution. As the State's chief executive, the Governor has a unique interest in the constitutionality of this important procedural protection created by the State for vulnerable children. As stated in the attached brief, the decision below threatens to undermine the integrity of and public confidence in the State's authority to fairly adjudicate adoption and custody disputes. Illinois is not alone in this regard; at least 16 other states have adopted similar procedural protections. The decision below casts a cloud of uncertainty as to the constitutionality of these provisions as well.

3. In addition, the decision below will affect the State's ability to address the sharply increasing number of children born to unmarried mothers and the tens of thousands of children taken into state custody who may ultimately have to be adopted. In the attached brief, the Governor seeks to assist this Court's understanding of how the incorrect Illinois ruling will impede him, as well as other state executives, in responding to these serious societal problems.

4. The Governor's brief provides a broader perspective of the issues implicated by the Illinois ruling than the briefs of the parties. Having shaped and implemented State policy, the Governor is in a better position to assess the decision's legal and societal impact. Unlike the two filed petitions, the attached brief is devoted to such discussion.

WHEREFORE, Governor Jim Edgar respectfully requests leave to file the attached *amicus* brief.

Dated: May 5, 1995

Respectfully submitted,

James S. Montana, Jr.*
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**Counsel of Record for*
Amicus

No. 94-1644 and 94-9087

IN THE

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October Term, 1994

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On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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BRIEF OF THE GOVERNOR OF THE STATE OF ILLINOIS AS *AMICUS* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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No. 94-1644 and 94-9087

IN THE

Supreme Court of the United States

October Term, 1994

BABY "RICHARD," a minor, by his guardian *ad litem*, Edward J. O'Connell, and JOHN and JANE DOE, Former adoptive parents of the child Richard,

Petitioners,

v.

OTAKAR KIRCHNER, Biological father of the child Richard,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE GOVERNOR OF THE STATE OF ILLINOIS AS *AMICUS* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS*

The Governor of the State of Illinois, Jim Edgar, respectfully submits this brief as *amicus* in support of the petitions for writ of certiorari to the Supreme Court of Illinois.[1] *Amicus* is the chief executive officer of Illinois,

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[1] On April 5, 1995, John and Jane Doe, the former adoptive parents of the minor child known as "Richard," filed a Petition for Writ of Certiorari. On April 7, 1995, Edward J. O'Connell, the Guardian *Ad Litem* for Richard, also filed a Petition for Writ of Certiorari to the Illinois Supreme Court. This *amicus* brief together with the accompanying motion for leave to file as *amicus* are submitted in support of both petitions. The Petition by the Does will be cited herein as "Doe Pet."; the Petition by the Guardian Ad Litem will be cited as "GAL Pet."; the Appendix to the Doe Petition will be cited as "App."

and is charged with the responsibility to ensure the faithful execution of the laws and public policy of the State.

It is neither correct under the federal Constitution nor the law or public policy of this State to cause the sudden, traumatic transfer of a four-year-old child from the only home he has ever known into the hands of his biological father whom he has never met and his biological mother who gave him up for adoption and set in motion the tragic set of circumstances now faced by Richard and the Does. Yet, because of the Illinois Supreme Court's erroneous interpretation of the federal Constitution and decisions of this Court, just such a transfer of the child in this case took place this past Sunday, April 30, 1995.[2]

Rather, it is the law and public policy of Illinois to provide for custody hearings in cases where court-ordered adoptions are later vacated, to guarantee judicial oversight of the well-being of vulnerable children, who through no fault of their own find themselves at the center of a wrenching controversy. The procedural protection provided by Illinois in this case — a court hearing, the bedrock of our justice system — is intended to ensure that

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[2] Obviously, the Does' actions obeying the court order in this case to transfer Richard has not rendered this appeal moot. *See Eagles v. United States ex rel Samuels*, 329 U.S. 304 (1946) (case not rendered moot after custody was transferred because writ of habeas corpus was granted); *Porter v. Lee*, 328 U.S. 246 (1946) (case not rendered moot where tenant complied with order to vacate); *see also Church of Scientology v. United States*, ___ U.S. ___, 113 S. Ct. 447 (1992) (case is not moot where party complied with lower court's order to transfer documents while appeal was pending); *Maher v. Roe*, 432 U.S. 464, 469 n.4 (1977) (agency's change in policy in compliance with court order while appeal was pending did not render case moot).

when the power and authority of the State is invoked to determine the status and welfare of children such as Richard, this decision-making is conducted fairly, correctly, and in view of all relevant facts. To do otherwise would seriously erode public confidence and acceptance of the State's authority over these critical decisions. The decision by the Illinois Supreme Court, however, eliminates that procedural protection for Richard, based on the wholly mistaken view that the federal Constitution mandates such a result.

If this decision stands, a very real human cost will be exacted upon Richard and the Does — the cost of the Illinois court's error has in fact already been inflicted in some measure by the initial removal of Richard from what he believed was his home. A societal cost will also accrue, as the integrity of the State's decision-making over critical issues such as where a young child will live and grow up is eroded, precisely at a time when there is an ever-increasing demand on the State to take action. Nationwide, over 1.2 million children are born to unmarried mothers each year — an increase of 82 percent since 1980. The number of children supported by the States in foster care has ballooned from 276,000 in 1986 to over 450,000 in 1992. At the same time, the number of adoptions has fallen sharply across the country, from 90,000 in 1970, to less than 53,000 a year today. It is for all of these interests that this *amicus* comes before the Court.

REASONS FOR GRANTING THE WRIT

For over three decades, Illinois law provided a clear and humane process for determining who shall have custody over a child when disputes arise among biological

parents and others with an interest in the child. It was a process grounded in the basic premises of our legal system — namely, ensuring a fair and impartial hearing before judicial decisions are made. It was a process designed to provide an opportunity for all relevant facts to be brought before the court. It was a process that recognized the delicate and profound nature of the court's determinations, and the crushing harm that could be caused vulnerable children in the event of an erroneous decision. The decision below invalidates and eliminates the long-standing Illinois process of holding custody hearings when a sanctioned adoption is later vacated. This ruling is based on the wholly mistaken belief that the federal Constitution, and the decisions by this Court, establish custodial rights in biological parents that precisely coincide with their parental rights and that would be infringed by an evidentiary hearing on the child's best interests.

Yet, the Constitution clearly does not equate parental rights with custody determinations, and in no way limits the right of the State to enact procedural safeguards to ensure that the best interests of children are met in custody proceedings. The irony here is that the Illinois court has invoked the federal Constitution and the fundamental due process guarantees it contains to *deny* the State of Illinois the ability to provide such due process to children in custody disputes arising out of failed adoptions. Such a result cannot stand.

By holding the best interests hearing established under Illinois law as unconstitutional, the Illinois court has not only eliminated the ability of the State to provide basic procedural protections, but has also called into question the constitutionality of similar proceedings in jurisdictions

throughout the country. The controversy and doubt generated by the Illinois decision has already begun, and will lead to an unworkable patchwork of conflicting and contradictory interpretations of the constitutional mandates of this Court.

This confusion alone would be reason enough to grant the requested writ in this case. *Michigan v. Long*, 463 U.S. 1032 (1983) (finding review appropriate where state supreme court made erroneous interpretation of federal Constitution). The fact that this confusion arises in the context of judicial determinations as to the lives and well-being of infants and young children provides an even more compelling reason for a swift and clear correction by this Court of the fundamental errors in the decision below. The lack of clarity and certainty as to the procedural protections for making these difficult decisions will undermine the compelling State interests in promoting adoptions, assuring unmarried mothers of the care and protection their children will receive, and guaranteeing adoptive parents who come forward to provide homes for these children fairness and an opportunity to be heard. The human cost of the error here is real and tragic, and underscores the urgent need for consideration of this case by this Court.

I.
THE ILLINOIS SUPREME COURT IS WRONG IN CONCLUDING THAT IT IS UNCONSTITUTIONAL FOR THE STATE TO PROVIDE FOR A CUSTODY HEARING FOLLOWING A VACATED ADOPTION ORDER

The effect of the writ of habeas corpus issued "forthwith" by the Illinois Supreme Court on January 25,

1995, was to order the immediate transfer of Richard from the Does, with whom Richard had lived all of his life, to Otakar Kirchner, his biological father, and Daniella Kirchner, his biological mother who had given him up for adoption. This judicially ordered transfer, in the Illinois court's view, was to take place without any further hearings by the state courts, fact-finding as to the circumstances of such transfer or Richard's future, or any regard for the effect on Richard.[3]

This clearly was *not* the intent of the State of Illinois, which had in place procedural protections providing for a hearing at which the best interests of Richard — including the parental rights and interest of his biological father and the actions of and care provided by the Does — could be heard, reviewed and considered. Prior to the decision here, Illinois statutory and case law provided for a

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[3] After the January 25, 1995 order by the Illinois Supreme Court, the Does and Kirchner were engaged in a lengthy dispute as to the manner in which Richard was to be moved from his home with the Does over to Kirchner, which led to a sudden, painful transfer of Richard on April 30, 1995. Janan Hanna, *"Richard" A Baby No More, But The Talk Drags On*, Chi. Trib. Mar. 16, 1995, at 4; Andrew Fegelman, *Kirchner Won't Wait For Custody; Father of Richard Frustrated By Delays*, Chi. Trib., Apr. 11, 1995, at 1; Janan Hanna, *Baby Richard Tug-Of-War Gets Messier; Each Side Asks Court To Intervene*, Chi. Trib., Apr. 18, 1995, at 1; Bob Greene, *Wrenching Day For "Richard"; "Don't Send Me Away Boy Begs"*, Chi. Trib., May 1, 1995 at 1. All of this has occurred without the benefit of a judicial forum in which to air and resolve these disputes, because the decision below invalidated further judicial proceedings concerning the custody of Richard. The obvious harm and rancor that has ensued in this case, with *no* ability by the State to provide a forum for resolving disputes, clearly demonstrates the urgent need for continued judicial hearings when an adoption is vacated.

hearing at which custody decisions could be properly made, even though parental rights were not terminated. Thus, in the long-standing precedent of *Giacopelli v. Florence Crittenton Home*, 16 Ill. 2d 556, 158 N.E.2d 613 (1959), the Illinois Supreme Court itself recognized that where, as here, a mother has been found to have relinquished her parental rights and placed a child for adoption, while the father has not, a determination nonetheless must be made as to the child's best interests in deciding custody. This must be based on the evidence presented to a trier of fact (*id.* at 566-67, 158 N.E.2d at 618-19), for, as the Illinois court previously recognized, "[w]e cannot speculate with the life of a child . . ." *Id.* at 566, 158 N.E.2d at 618.

Consistent with these considerations, the Illinois Marriage and Dissolution of Marriage Act (the "Act") clearly sets out judicial proceedings for a hearing to determine the custody of a child, "in accordance with the best interest of the child." 750 ILCS 5/601-602. Kirchner himself has admitted that the prior adoption proceedings in this case did not in any way reach the custody issues raised by the Doe's petition for such a hearing. Resp't Br. in Opp'n to Writ of Cert. at 11-14, filed in *In re Doe*, 159 Ill. 2d 347, 638 N.E.2d 181, *cert. denied*, ___ U.S. ___, 115 S. Ct. 499 (1994) ("the issue of Richard's custody may yet be raised in subsequent litigation, presumably upon filing by the Does of a petition for a custody hearing").[4]

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[4] Illinois further reiterated its public policy of affording the procedural protection of a custody hearing with the enactment of Public Act 88-550, which explicitly codified the precedent under prior law that a custody hearing may ensue following a failed

(continued...)

The decision by the Illinois Supreme Court overrules the prior consistent law of Illinois, based on the court's erroneous interpretation of the federal Constitution and the rulings of this Court. Beginning with its own long-standing precedent, the Illinois court, citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), ruled "that the holding of *Giacopelli* is clearly unconstitutional," and "stands as an unconstitutional remnant of a bygone era and has no precedential value." (App. at 11a-12a).

The court then went on to evaluate the custody proceeding provided under the Act, "commenc[ing] with a review of the rights afforded unwed fathers by our federal Constitution." (App. at 16a). The conclusion of this "review" is that "fathers such as Otto, whose parental rights are not properly terminated and who, through deceit, are kept from assuming responsibility for and developing a relationship with their children, are entitled to the same due process rights as fathers who actually are given an opportunity to and do develop this relationship." (App. at 16a-17a). According to the Illinois Supreme Court, the "superior rights of the natural parents to the care, custody

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[4](...continued)

adoption in order to determine the custodial setting that is in the child's best interests. *See* 750 ILCS 550/20 (West 1995 Pocket Part). Provision for such a custody hearing is consistent with the procedure in at least 16 other states and with the express terms of the new Uniform Adoption Act recommended to the states by the National Conference of Commissioners on Uniform State Laws, after long and careful deliberation by family and constitutional law experts from across the country. *See* Doe Pet. at 14-16 & n.5-6; *see also* Mark Hansen, *Fears of the Heart*, 80 A.B.A.J. 58 (Nov. 1994).

and control of their child is the law of the land," (App. at 19a), and these "superior right[s]" mandate that a custody hearing by non-parents may only occur "upon voluntary relinquishment" of the child. (App. at 20a-21a). However, neither the words "voluntary relinquishment," nor any similar requirement appears anywhere in the Illinois statute. This is simply an unsupported gloss derived from a tragically mistaken interpretation of this Court's constitutional jurisprudence.

As explained by Justice McMorrow in her dissenting opinion below, *none* of the five decisions by this Court on the constitutional rights of unwed biological fathers creates the "superior parental rights" asserted by the Illinois majority to eliminate the required custody hearing. *See* App. at 76a-78a (McMorrow, J., dissenting), citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972); *see also* Doe Pet. at 25-27; GAL Pet. at 26. To the contrary, together these cases establish the constitutional principle that the State may *limit* the rights of unwed biological fathers who do not come forward promptly and establish a relationship with and assume responsibility for a child who is now in the care of others. *See, e.g., Lehr*, 463 U.S. at 261 ("the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds.").

Nowhere is there constitutional precedent for holding that where a biological link is determined to exist, a presumption of "superior rights" is created and the State

is divested of any ability to hold further hearings as to the welfare of the child.

Indeed, the tautology created by the Illinois majority — that an unwed biological father whose parental rights are upheld has immediate and exclusive custody of a child — has no basis in law. Clearly, there are numerous examples where the custodial rights of biological parents are subject to judicial proceedings, without a showing of unfitness so as to terminate their parental rights. Such limitations on the *custodial* rights of parents are constitutionally valid and do not implicate the same concerns as the termination of parental rights. *See Robison v. Via*, 821 F.2d 913, 921 (2nd Cir. 1987) and cases cited therein (it is "well established" that parents may be deprived of custody to protect safety of child); *Newton v. Burgin*, 363 F. Supp. 782 (W.D.N.C. 1973), *aff'd* 414 U.S. 1139 (1974) (considering and upholding state statute providing that state may assume custody of child for a minimum of five days without hearing if deemed to be in best interests of the child). *See also Raboya v. Shrylbman & Assoc.*, 777 F. Supp. 58, 60 (D.D.C. 1991) ("because the statutory scheme for child neglect involves at most a temporary suspension of parental rights, due process only requires that a finding of neglect be based on preponderance of evidence").

The fallacy of the Illinois court's ruling that the presumption of parental rights accorded Kirchner invalidates the State's express interest in a custody hearing on Richard is underscored by the seminal decision in *Stanley*, 405 U.S. 645. There, the State of Illinois' asserted presumption that unwed fathers were unfit resulted in the unconstitutional removal of children, without the benefit of

a hearing, from the custody of their unwed biological father, with whom they had lived all their lives. As this Court noted:

> Procedure by presumption is always cheaper and easier than individual determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Stanley, 405 U.S. at 656-57.[5]

Here, it is the Illinois Supreme Court that has impermissibly applied a presumption for formality — the bare existence of parental rights — to replace judicial procedure with procedure by presumption, and foreclose any inquiry into "the determinative issues of competence and care . . ." This result is clearly contrary to the Constitution and the very rulings of this Court relied on by the Illinois majority, and it "cannot stand."

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[5] In response to concern with delay, such as that expressed by the Illinois Supreme Court here, this Court observed that "the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley*, 405 U.S. at 656.

II.
THE ILLINOIS RULING CONFLICTS WITH THE INTEREST OF THIS STATE, AND THE RULINGS OF OTHER STATES, IN PROVIDING FOR A CUSTODY HEARING WHERE AN ADOPTION HAS FAILED

The result of the decision by the Illinois court is to divest the state trial courts of any ability to hear evidence or make decisions concerning the best interests of a child in determining custodial issues, such as where a child is to live, what visitation may occur, or even the circumstances of the child's transfer from an adoptive home where he may have lived his entire life to a new home with biological parents he has never seen. The Illinois court confuses a decision regarding the termination of parental rights with a decision regarding the child's custody — a decision made every day in courts throughout the land — without implicating parental rights. This distinction, and the procedural hearings afforded by Illinois and other states that recognize this distinction, are rooted in the "present realities" of family life today, where we know that "competence and care" for children does not always coincide with the existence of biological parental rights. *Stanley*, 405 U.S. at 657. The failure of the Illinois Supreme Court to recognize this important distinction has cast a cloud of uncertainty on the statutory provisions in Illinois and other states as well as the adoption process and protection for children in this nation, and has caused real harm and trauma to a small child.

A. The Constitutional Limitations Imposed By The Illinois Court Directly Contradict The Rulings of Other States On This Very Issue

The failure by the Illinois court to distinguish between parental rights and custody determinations, and to deny Richard and the Does an opportunity to be heard on the issue of Richard's custody, is plainly wrong and is directly contradicted by rulings in other states. On March 30, 1995, the Supreme Court of New Mexico, interpreting *Stanley* and its progeny, voided the termination of an unwed father's parental rights but held that "[a] finding that parental rights were improperly terminated does not mechanically result in the award of custody to the biological parents." *In re Adoption of J.J.B.*, No. 21,864, slip op. at 27 (N.M. S. Ct. Mar. 30, 1995). The New Mexico court expressly rejected the ruling by the Illinois court here, observing that:

> The Illinois court seemed to conclude that the child's best interests are defined entirely by the rights of the natural parents when parental rights have been terminated. Thus the court automatically awarded custody of the child to the biological parent. We decline to adopt this bright line approach. We are directed to do otherwise, not only by the letter of the law but also by compassion for the people involved.

Id. Accordingly, the New Mexico court transferred the case for the very custody proceeding that the Illinois court says is constitutionally barred: a hearing by the trial court to determine "the delicate balance of interests in the natural parent-child relationship as measured against custody in

other persons; such a decision cannot be based upon the written appellate record." *Id.* at 32.

In summary, the New Mexico court emphasized that "the trial court should not be bound by the traditional bright line solution of awarding the child like a trophy to whichever party wins the litigation. The child's best interests may be served by applying more equitable principles." *Id.* at 33. This ruling is consistent with that of several other states in which the courts have interpreted the federal Constitution to recognize the distinction between the termination of parental rights and custody determinations, and holding that a trial court, hearing all issues, is where custody decisions are to be made, based on the best interests of the child. *In re Custody of C.C.R.S.*, 1995 WL 33091 (Colo. Jan. 30, 1995). Contrary to the Illinois ruling here, these courts hold that there is *no* constitutional right to custody of a child, and that any preferential considerations accorded a biological parent may be overcome following a full consideration of the child's best interests. *See, e.g., In re Baby Boy C.*, 630 A.2d 670 (D.C. App. 1993), *cert. denied*, ___ U.S. ___, 115 S. Ct. 58 (1994); *Lemley v. Barr*, 343 S.E.2d 101 (W. Va. 1986); *Sorentino v. Family & Children's Society of Elizabeth*, 74 N.J. 313, 378 A.2d 18 (1977).[6]

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[6] The very nature of the psychological and emotional harm to Richard, resulting from an order to transfer custody to people he has never known, warrants a hearing. Psychologists have commented on the grave effects of a transfer of custody on a child, revealing that:

> Continuity of relationships, surroundings, and environmental influence are essential for a child's

(continued...)

B. The Illinois Decision Undermines The State's Compelling Interests To Provide For A Custody Hearing

In the absence of a custody hearing, as provided by the Act, Illinois is deprived of the procedural protections granted in states like New Mexico to ensure its citizens of fairness, compassion and the equitable weighing of the delicate and difficult balance in the competing interests at stake. Indeed, this case itself demonstrates the compelling state interest in such procedural protections. As evidenced by the fundamental factual discrepancies between the majority opinion and the two dissents, there is simply no resolution, nor has any trier of fact reached an evidentiary determination, as to the critical facts bearing upon the future welfare of this four-year-old child; these issues were simply not the focus of inquiry in the initial adoption proceedings. *Compare* App. at 2a-8a (majority

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[6](...continued)

> normal development. Since they do not play the same role later in life, their importance is often underrated by the adult world.
>
> Physical, emotional, intellectual, social, and moral growth does not happen without causing the child inevitable internal difficulties. The instability of all mental processes during the period of development needs to be offset by stability and uninterrupted support from external sources. *Smooth growth is arrested or disrupted when upheavals and changes in the external world are added to the internal ones.*

J. Goldstein, A. Freud, A. Solnit, *Beyond the Best Interests of the Child* 31-32 (1979) (emphasis added). Indeed, the traumatic effects of a change in custody cannot be underestimated, as some children experience insomnia, weight loss, and withdrawal. David Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich. L. Rev. 477 (1984).

summary of facts) *with* App. at 40a-43a (McMorrow, J., dissenting) (dissent's correction of facts). *See also* App. at 35a (Miller, J., dissenting) ("The majority's efforts to resolve these questions of fact in this opinion are premature . . ."). The precipitous and abrupt decision by the Illinois majority, which divested the state trial courts of *any* procedure for hearing evidence and overseeing the remainder of this case, consigned the fate of a small boy to the disputes and hostilities of opposing parties with no available forum to provide a reasonable resolution based on the facts.

The custody hearing provided for under the Act clearly affords all parties to a failed adoption procedural protections and ensures that judicial decisions about where a child would live could be made fairly and correctly, in view of all the evidence. The "superior rights" of the biological father, which so concern the majority below, are plainly acknowledged in the terms of the Act itself and must be taken into consideration in determining the child's best interests at the custody hearing.[7] Conduct of "present or proposed" custodians that affect their relationship with the child are within the scope of the hearing. 750 ILCS 5/602(b). Thus, the majority's repeated concerns regarding "child abductions" are answered, not obviated, by granting a full hearing on the child's best interests. (App.

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[7] The Act specifically mandates in its definition of the best interests of the child that "[u]nless the court finds the occurrence of ongoing [domestic violence] abuse . . . the court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child." 750 ILCS 5/602(c) (West 1995 Pocket Part).

at 21a). Most importantly, the State's interest in providing a hearing for the full development of relevant facts before a trier of fact mandates that a custody hearing be held.

The Illinois decision that such a hearing is constitutionally barred fuels and perpetuates the turmoil in Illinois, where a challenge has now been mounted to the new statute enacted last year. Andrew Fegelman, *"Baby Richard" Law Faces First Test in Custody Fight*, Chi. Trib., Apr. 28, 1995, at A1, A12. Review by this Court is the only solution to this ongoing controversy. Moreover, the conflict between the Illinois ruling here and the decisions of other states has created tremendous confusion and uncertainty as to the constitutional rights and limitations imposed in this arena. The legal uncertainty generated among the States provides adequate grounds for granting the writ here; the human cost of this continued upheaval cries out for direction from this Court.[8]

The citizens of Illinois have just witnessed yet another traumatic removal of a child from the only home he has ever known. At the same time this personal grief is visited upon this individual case, the nation is experiencing

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[8] Unfortunately, Richard's case is anything but an isolated occurrence. Children throughout the country have been the subjects of painful custody disputes between biological parents and would-be adoptive parents. *See, e.g.*, Mark Hansen, *Fears of the Heart*, 80 A.B.A.J. 58 (Nov. 1994) (case of "Baby Emily", a two-year-old whose custody case has been creeping through the Florida appellate courts since her adoption was set aside in June 1994); *In re Adoption of J.J.B.*, No. 21,864, slip op. (N.M. S. Ct. Mar. 30, 1995) (case of four-year-old New Mexico child whose three-and-one-half year custody battle resulted in the New Mexico Supreme Court ordering a resolution based on the child's best interests).

a startling upsurge in births to unmarried women. The number of births out of wedlock has grown at a near exponential rate over the last thirty years, from five percent of all births nationwide to nearly 30 percent, and based on its current trajectory will reach 50 percent by 2003.[9] The number of births to unmarried mothers in 1991 totaled 1.21 million, an 82 percent increase since 1980.[10] Yet, paternity is established for only approximately one-third of the annual births to unmarried women.[11] The number of children in the foster care system nationwide has also ballooned, from 276,000 in 1986 to over 450,000 in 1992, according to the National Council for Adoption and the American Public Welfare Association.[12] Sadly, as the number of children who stand to gain the most from adoption has skyrocketed, the number of children adopted each year has receded. Adoption in America has been precipitously falling over the last two decades, from 90,000 unrelated domestic adoptions in 1970 to less than 53,000 a

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9 Dep't of Health and Human Servs., Admin. for Children and Families, Office of Child Support Servs., *Seventeenth Annual Report to Congress* 3 (1992); David S. Broder, *Illegitimacy: An Unprecedented Catastrophe*, Wash. Post, June 22, 1994, at A21. *See also* U.S. Bureau of the Census, *Statistical Abstract of the United States* 78 (113th ed. 1993). This has grown to nearly double the rate cited by the dissent in *Caban*. *See* 441 U.S. at 402 n.2 (Stevens, J., dissenting).

10 Dep't of Health and Human Servs., Admin. for Children and Families, Office of Child Support Servs., *Seventeenth Annual Report to Congress* 3 (1992).

11 *Id.* at 11.

12 Thomas McArdle, *Exploring the Adoption Option*, Investor's Business Daily, Aug. 4, 1994, at 1.

year today, according to the National Council for Adoption.[13]

Thus, the potential for repeating the tragic circumstances visited upon Richard here is great. The *Giacopelli* court, the Illinois General Assembly and the Governor of this State have acted in an effort to minimize this avoidable anguish by providing procedural protections for all parties. The erroneous decision by the Illinois Supreme Court holding that the federal Constitution denies these protections must be reviewed.

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[13] *Id.* The chilling effect this case will have on adoptions in this country is already a source of commentary and concern. *See, e.g.*, Allen Warren and Louise Kierman, *For Some, Adoption Gets Scary*, Chi. Trib., May 3, 1995, at A1, A10.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court grant the petitions for a writ of certiorari in this case.

Dated: May 5, 1995

Respectfully submitted,

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Nos. 94-1644 and 94-9087

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN and JANE DOE,
Former adoptive parents of the child Richard,

Petitioners,

v.

OTAKAR KIRCHNER,
Biological father of the child Richard,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE THE YALE UNIVERSITY CHILD STUDY CENTER, ALBERT J. SOLNIT, M.D., AND FRED R. VOLKMAR, M.D. IN SUPPORT OF THE PETITIONERS

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Nos. 94-1644 and 94-9087

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

The Yale University Child Study Center, Dr. Fred R. Volkmer and Dr. Albert J. Solnit respectfully move for leave to file the attached brief *amicus curiae* in this case and state as follows:

1. The petitioner consents to this filing. Attempts by phone and mail to communicate with the attorney for the respondent to obtain consent went unanswered.

2. The interest of the amici in this case arises from their groundbreaking work in the field of early childhood development. The petition seeks review of whether there

is a liberty interest, within the due process clause of the Fourteenth Amendment, in the family bonds between an adopted child and his adoptive parents. It is the amici's contention, based on their professional experience, that children adopted in infancy attach themselves naturally to their adoptive parents. Even when that adoption is later legally terminated, continued custody by the adoptive parents may be in the best interest of the child. Such custody should not be terminated by operation of law, as Illinois has done here (by ordering that the child returned to his birth father "forthwith"), but should instead be subject to a hearing to weigh the child's liberty interest against the possibly inconsistent legal interests of the biological parents.

3. The proposed amicus brief is short, avoids duplication of the petition and presents factual material unavailable in the record concerning the liberty interest of adopted children.

Respectfully submitted,

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On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITIONERS

Amici curiae The Yale University Child Study Center, Dr. Fred R. Volkmer and Dr. Albert J. Solnit respectfully request that this Court grant the petition of writ of certiorari seeking review of the Illinois Supreme Court's decision in this case.

INTERESTS OF THE AMICI CURIAE

The Yale University Child Study Center has a long standing interest in issues of child development and child custody. Dr. Fred R. Volkmer, Harris Associate Professor

of Child Psychiatry, Pediatrics and Psychology, Yale University Medical School, and Dr. Albert J. Solnit, Sterling Professor Emeritus of Psychiatry and Pediatrics, Yale University Medical School, are long time principals of the Center.

This Court's Rule 37.1 states that an amicus brief can be of considerable help to the Court if it brings relevant matter to the attention of the Court not already presented by the parties. The amici understand that the record contains no evidence of the developmental effects of the permanent removal of Richard by his biological father (the respondent in this case) from the custody of Doe petitioners. The amici address this issue on Richard's behalf as mental health professionals, a field in which they have special and considerable expertise. They believe that there is a liberty interest, within the due process clause of the Fourteenth Amendment, in the family bonds between an adopted child and his adoptive parents that warrants an evidentiary hearing before the termination of that relationship.

FACTS OF THE CASE

From their review of the record, amici understand the facts of the case as follows: The adoptive child, known as Richard, was born on March 16, 1991 to a 24 year old unwed mother, Daniella Janikova, who within a week of the birth executed a consent to adoption and who also refused to disclose the identity of the biological father. Richard was then placed directly with the adoptive family (the Does) upon discharge from the hospital. Apparently at some point the biological father was falsely told that the child died. After the child's placement, the biological parents reconciled and were married. When the child was more than six months old, the biological father filed a peti-

tion to establish his paternity. He was declared the biological father. The adoptive parents filed an amended petition to adopt, and in May 1992 the Circuit Court of Cook County entered a judgment of adoption in favor of the adoptive parents. App. 151a.

After various interim appellate proceedings, the Illinois Supreme Court on June 19, 1994 held that the adoption was invalid and vacated the adoption order. App. 89-90a. After this Court denied review, and the Does and Richard's guardian ad litem commenced a proceeding for determination of custody in circuit court, the biological father brought an original habeas corpus proceeding in the Illinois Supreme Court to preclude the custody hearing and to gain immediate custody of Richard. On January 25, 1995 the Illinois Supreme Court granted the writ and ordered the adoptive parents to surrender custody of Richard "forthwith." App. 84-85a. Amici understands custody was surrendered on April 30, 1995. Richard is now four years old.

Amici emphasize that they have not personally examined the parties involved nor are they in any way commenting on the capabilities of the biological parents to be competent parents. Rather they wish to comment on what is in the child's best interests when an adoption is terminated.

REASONS WHY THE PETITION SHOULD BE GRANTED

Children need to form stable relationships with loving adults. Studies of children raised in setting where the stable relationship is lacking or interrupted are at greatly increased risk of personality and psychiatric disorders later in life. To move a four-year-old child in Richard's situation from the only parents he has ever known places his future development at great risk. Competent mental

health professionals, through expert testimony on appropriate examinations, can advise a court as to the parameters of the risk and otherwise assist the court in determining what action is appropriate.

As mental health professionals with a long standing interest in issues of child development and child custody, amici are gravely concerned that, under the Illinois Supreme Court order, Richard has been entrusted to the care of an individual who is his biological parent but who has not functioned as his parent since his birth. Based on amici's awareness of the facts of this case and their experience with many similar cases, they believe that his removal from the only parents he has ever known puts his development at serious risk and constitutes a material injustice to the child. In this regard amici speak as child experts and mental health professionals for Richard, whose best interests have been served by his current parents. Accordingly, some process is due before the state intrudes upon or disrupts the relationship in this well-functioning family, constituted by Richard and his parents, the Does.

With regard to the child, there appears to be no dispute that the adoptive parents have functioned as his only parents, his psychological parents, since his placement with them shortly after birth. Since that time they have provided him with what is described as a loving, caring and secure home. By these measures, the Does are Richard's actual parents. Richard has formed his attachments to them as parents and these attachments are, by now, well consolidated.

All children need to form stable relationships with loving adults, especially their parents. This process of developing such attachments begins at birth. By the age of one, the

child's conception of who her/his parents are is well established. Even before the first birthday this foundational attachment is manifest in such behavioral phenomena as stranger anxiety and the maintenance of physical proximity to the parents. By the time that language has developed, these processes have been further consolidated; and while subsequent modifications in the child's conception of and relationship to his other parents are made throughout life, it is these very earliest attachments which are the most fundamental.

Studies of children reared in settings where such attachments cannot develop, such as in institutions, have consistently revealed such children to have severe and enduring developmental and behavioral delays. S. Provence & R. Lipton, *Infants in Institutions* (International Universities Press, 1962). Such children are at very greatly increased risk for personality and psychiatric difficulties later in life. J. Bowlby, *Maternal Care and Mental Health* (World Health Organization, 1954). It is for this reason that orphanages and other large institutional settings for care of infants and young children have been effectively closed in this country. It is also clear that children reared in settings where they have had changing parental figures, *e.g.*, multiple foster placements, are also at markedly increased risk for developmental and emotional problems. J. Goldstein, A. Freud and A.J. Solnit, *Beyond the Best Interest of the Child* (Free Press, 1973); A.J. Solnit, B.F. Nordhaus and M.A. Lord, *When Home is No Haven: Child Placement Issues* (Yale University Press, 1992).

Senior clinicians, teachers, and researchers at amicus Center have a long-standing awareness of these findings. In the series of publications cited above, amici have documented the adverse effects of disruption of early parental attachments and the importance of stability in child

placement always guided by the overarching principle of the child's best interest. This implies supporting, to the extent possible, the psychological parent(s) in their attempts to provide for the child. That is why in the State of Connecticut, where amici are based, the legal presumption is that every effort should be made to support parents and children and avoid disruption of existing parental relationships as far as possible. In most cases the psychological and biological parents are, of course, one and the same. When, as in this case, they are not the same, the child's best interests would almost certainly be served by having him remain with the psychological parents. Amici say "almost certainly" because they have obviously not conducted a formal evaluation, but their position is that a court should consider the child's interest in the light of evidence, rather than acting by judicial fiat.

It is clear that what may in the biological parents' interests may conflict with the child's best interests. To move Richard from the care of the only parents he has ever known will put his future development at very grave risk. Such a move could have disastrous effects on his future development. As the Illinois Appellate Court has noted, the issue here is not the same as would be entitled in the adjudication of an issue of ownership of a chattel. App. 118a. Rather, the issue of the child's best interest should remain paramount.

CONCLUSION

The bright line rule announced by the Illinois Supreme Court forecloses any consideration of these developmental issues in an evidentiary hearing. While as the court below determined, there may be some societal costs in permitting consideration of the best interest of the child in picking up the pieces after a failed adoption, amici as mental health professionals stress that there are very real, immediate costs to the child and that these costs must be heard and considered in the judicial process revolving such an adoption.

To conclude, as the Illinois Supreme Court did, that the Due Process Clause forbids consideration of these psychological costs is inhumane and destructive. Aware of the harm that can follow the removal of a child from the custody of the only parents he has known, amici respectfully urge this Court to hear this case and reverse the decision below.

Respectfully submitted,

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Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF HONORABLE PAUL SIMON, UNITED STATES SENATOR, HONORABLE CAROL MOSELEY-BRAUN, UNITED STATES SENATOR, THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, AND THE AMERICAN ACADEMY OF PEDIATRICS IN SUPPORT OF PETITION FOR CERTIORARI OF BABY "RICHARD"

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Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI OF BABY "RICHARD"

Amici, Honorable Paul Simon, United States Senator, Honorable Carol Moseley-Braun, United States Senator, The American Academy of Child and Adolescent Psychiatry and The American Academy of Pediatrics (collectively, "Amici"), pursuant to Supreme Court Rule 37.2, respectfully move for leave to file the attached brief *amicus*

curiae in support of the Petition for Certiorari of Baby "Richard" to review the judgment of the Illinois Supreme Court in this case. Amici have sought the consent of the parties to file their brief. Petitioners Baby "Richard" and John and Jane Doe have consented, and the original letters from petitioners' counsel evidencing such consent have been filed with the Clerk of this Court. Respondent Otakar Kirchner has refused Amici's request for consent, thereby necessitating this motion.

As set forth more fully in the "Interest of the Amici" section of the brief, each of the Amici have devoted themselves or their organization to issues affecting children and have consistently sought to protect the rights of children.

The Illinois Supreme Court's decision determined that minors have no constitutional rights to due process in the context of a failed adoption. Amici strongly believe that this decision is incorrect. This Court has consistently recognized children's rights to due process in a variety of situations, which should extend to the right of a child to due process in a custody determination made after a failed adoption.

This brief *amicus curiae*, which Amici respectfully request permission to file, further amplifies the discussion regarding the due process rights of children and the national policy implications of the Illinois Supreme Court's decision.

Respectfully submitted,

One of the Attorneys for Amici Honorable Paul Simon, United States Senator, Honorable Carol Moseley-Braun, United States Senator, The American Academy of Child and Adolescent Psychiatry, and The American Academy of Pediatrics

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI OF BABY "RICHARD"

INTEREST OF THE AMICI

Paul Simon is a United States Senator from Illinois. In addition to being an adoptive father himself, Senator Simon is a Co-Chair of the Congressional Coalition on Adoption. Since 1985, he has served on the Senate Judiciary Committee, and chaired its Subcommittee on the Constitution from 1987 through 1994. He also sits on the Senate Labor and Human Resources Committee, which addresses issues related to children's health, education and

welfare. Senator Simon's longstanding interest in the rights of children and particularly, adoptive children, leads him to file this brief *amicus curiae* before the court.

Carol Moseley-Braun is a United States Senator from Illinois, the home state of the child Richard. She served on the Senate Judiciary Committee from 1993-1995, and was a member of the Courts and Administrative Practice and Juvenile Justice Subcommittees. She is the author of national legislation regarding adoption. Her longstanding interest in issues that concern the children of Illinois lead her to support the Petition for Writ of Certiorari in this case.

The issues presented on this petition for certiorari have wide-ranging implications with respect to the constitutionally protected interests of children who are subject to custody disputes. Similarly, the issues are significant to the security of adoptive families when an adoption is determined to have failed for one reason or another. As public servants and legislators, Senator Simon and Senator Moseley-Braun have consistently worked to protect the rights of children. For these reasons, both Senators support the Petition for Certiorari of Baby "Richard."

The American Academy of Child and Adolescent Psychiatry (AACAP) is a national professional organization of more than 5,700 child and adolescent psychiatrists. Its members are physicians who have completed a general psychiatry residency and two years additional residency training in child and adolescent psychiatry. AACAP members actively research, diagnose, and treat psychiatric disorders affecting children and adolescents and their families. The AACAP is dedicated to supporting this work through a variety of programs including government affairs, national public information and continuing medical education.

The American Academy of Pediatrics (the "Academy") is a national non-profit medical specialty society of more than 49,000 board-certified pediatricians. The Academy's principal purpose is to ensure the attainment by all children of their full potential for physical, mental and social health. To that end, the Academy advocates for children and their right to medical care through various means, including the adoption of professional policies, educational programs of all kinds, efforts to influence social and governmental policy and, occasionally, litigation.

Providing care for adopted children always has been a significant part of pediatric practice and the Academy has repeatedly demonstrated its unwavering commitment to the physical, mental and social welfare of these children. Indeed, the Academy has created a special committee called the Committee on Early Childhood, Adoption, and Dependent Care (the "Committee") which has focused on the unique needs of the adopted child. Through this Committee the Academy has issued numerous policy statements specifically addressed to issues involving adoption. (*See e.g., Initial Medical Evaluation of an Adopted Child*, AAP Policy Reference Guide (the "Guide") at 367 (1994); *Issues of Confidentiality in Adoption: The Role of the Pediatrician*, Guide at 389 (1994); *Families and Adoption: The Pediatrician's Role in Supporting Communication*, Guide at 194-195 (1994)). Through these policy statements the Academy and the Committee have emphasized that the adopted child and the adoption process may bring with them medical, emotional, cultural and psychosocial problems which demand special attention. The Academy has emphasized that in addressing these unique problems, the pediatrician, the adoptive family and society must recognize that among the primary needs and entitlements of every child and certainly the adopted child is a sense of

unconditional love, acceptance and permanency in the context of his or her adopted family.

As non-profit medical societies devoted solely to issues affecting children, the American Academy of Pediatrics and the American Academy of Child and Adolescent Psychiatry join Senators Simon and Moseley-Braun in supporting the Petition for Certiorari of Baby "Richard."

SUMMARY OF THE ARGUMENT

The issue in this case is whether a child is entitled, as a matter of due process, to a hearing on the issue of his custody after his or her adoption becomes void. The Illinois Supreme Court held that a child under these circumstances must be transferred to his biological father pursuant to a writ of *habeas corpus*, with no consideration of the interests of the child in that transfer of custody. The Illinois Supreme Court's decision, heavily emphasizing its view of the constitutionally protected interests of the biological parent, interpreted this Court's precedents to require that the child be returned to his biological father in order to vindicate the father's due process rights. In so ruling, the Illinois Supreme Court ignored the equally compelling and fundamental constitutionally protected interest of the child.

This Court has consistently recognized the rights of individuals, including children, to due process when decisions are made by the state which impact such constitutionally protected interests as the preservation of fundamental family relationships. Despite this Court's consistent recognition of due process rights when such relationships are impacted, Richard and the Does have been deprived of their fundamental family relationships with each other without the benefit of any hearing to consider Rich-

ard's interests in the outcome of the custody determination. This Court should grant *certiorari*, not only because of the grave injury a change in custody may cause to Richard, but, more importantly, because review is necessary to confirm the child's constitutional right to a full evidentiary hearing to determine the effect of a custody change on *all* interested parties.

ARGUMENT

Justice Brewer, writing for the Supreme Court of Kansas over a century ago, identified the legal standard which ought to apply in child custody determinations:

> [When a] child has been left for years in the care and custody of others, who have discharged all the obligations of support and care which rest upon the parent, then, whether the courts will enforce the father's right to the custody of the child, will depend mainly upon the question whether such custody will promote the welfare and interest of such child . . . It is an obvious fact that ties of blood weaken, and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel.

Chapsky v. Wood, 26 Kan. 650, 653 (1881).

The issue in this case, as in *Chapsky*, is whether a child who has spent his entire life in the care of a loving and supportive family is to be removed from that family and given to a biological father he has never met. Richard has been ordered by the Illinois Supreme Court to sever all of the ties he has to his adoptive parents and their son, Richard's adoptive brother, and has been ordered into

the custody of his biological father—a man now married to the woman who signed away all her rights to Richard four days after his birth, and who told the biological father the baby had died. Unlike the enlightened court in *Chapsky*, the Illinois Supreme Court has taken the position that Richard's biological parent has an absolute due process right to custody of his child, and that Richard has no parallel constitutionally cognizable interest in the outcome of these proceedings. In essence, the Illinois Supreme Court held, as a matter of constitutional law, that Richard's interests in a determination of his own custody were irrelevant.

This holding was manifestly erroneous. Like his biological father, and like his adoptive parents, Richard is entitled to full consideration of his interests before an award of custody is entered: the kind of consideration required by the due process clause, and available only through a complete evidentiary hearing on the wide range of interests affected by a custody determination in this case.

I. Richard Was Denied His Constitutional Right To Due Process By the Illinois Supreme Court's Ruling

In ruling that, absent a finding of unfitness, a biological parent is automatically and constitutionally entitled to custody regardless of what other family relationships the child may have developed, the Illinois Supreme Court ignored Richard's right to due process—that is, his right to a full evidentiary hearing to consider Richard's own constitutionally cognizable interests in a custody determination. This Court has consistently recognized that due process is one of the fundamental protections afforded by our Constitution:

> Due process of law is the primary and indispensable foundation of individual freedom. It is the

> basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. As Mr. Justice Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure."

In re Gault, 387 U.S. 1, 20-21 (1967) (*citations omitted*). Among the historic liberties protected by the due process clause is the right to be free from, and obtain judicial relief for, unjustified intrusions on personal security. *Vitek v. Jones*, 445 U.S. 480, 492 (1980). In this case, however, the Illinois Supreme Court allowed just such an intrusion on Richard's personal security, focusing on the constitutional rights of Richard's biological father. Ironically, in its haste to vindicate the constitutional rights of Mr. Kirchner, the Illinois Supreme Court overlooked the constitutional rights of Richard, and in so doing committed reversible constitutional error.

While this court has never had occasion to consider precisely whether a child is entitled as a matter of due process to a hearing on the issue of permanent custody, it has determined, as a general matter, that minors are protected by the Constitution and possess constitutional rights. *See, e.g., Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976); *In re Gault*, 387 U.S. 1, 13 (1967). Indeed, this Court has recognized a child's right to due process in the context of custodial determinations not dissimilar to the proceedings at issue here. In *Gault*, the court determined that a child has a right to due process in the context of a juvenile court action which was designed to determine where that child would temporarily live and be raised, and which had as one of its goals the preservation of extant family relationships. Here, the Illinois Supreme Court's decision determined where

and with whom the child would *permanently* live, a decision with the potential to disrupt and eviscerate the only family relationships that child has known. Under the rationale of *Gault*, the child must be afforded due process—in the form of a full evidentiary hearing on the issue of custody—before a decision impacting his fundamental relationships and living situation is made.

Several of this Court's other decisions also provide a constitutional framework for analyzing the issue presented here, and, like *Gault*, compel the conclusion that the court should revisit the decision of the Illinois Supreme Court. These cases set forth two related propositions. First, contrary to the Illinois Supreme Court's decision, they emphasize that a family relationship giving rise to constitutionally cognizable liberty interests is not simply a function of biology, but rests on emotional and custodial bonds that emerge over time. Second, this Court's decisions recognize that the legitimate interests of a biological parent may be vindicated in a constitutional manner without ignoring other legitimate interests that arise in a custody proceeding, and without resorting to the one-sided constitutional analysis engaged in by the Illinois Supreme Court in this case.

For example, in *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court held that a statutory presumption that an unwed father was an unfit parent and not entitled to custody was unconstitutional, and that the father was entitled to a hearing before the state removed his three children from his custody after the death of their mother. *Id.* at 657-58. Thus, under *Stanley*, the unwed father was given the opportunity to participate in a custody hearing and to petition for custody of his children. He was not, however, held to have an absolute constitutional right to custody of the children in the event he was found to be a fit father.

Similarly, in *Quilloin v. Wolcott*, 434 U.S. 246 (1978), this Court rejected an unwed father's attempt to prevent the adoption of his child by a stepfather and, in so doing, protected the very interests ignored by the Illinois Supreme Court in this case. The Court affirmed the trial court's decision to grant the adoption because it was in the child's best interest. *Id.* at 255. The Court distinguished between the rights of unwed fathers who had long-standing and intimate relationships with their children, as in *Stanley*, and the rights of unwed fathers who lacked any actual relationship with their children other than biology. *Id.* at 248. The Court suggested that the unwed father's parental rights resulted from his relationship with the child and not the biological connection, and that full consideration of the child's interests under a "best interests" standard adequately protected the biological father's own constitutional rights. *Id.* at 254-56. *See also Lehr v. Robertson*, 463 U.S. 248 (1983) (Mere existence of biological link does not merit constitutional protection without actual relationship between the parent and child.).

Finally, in *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977), this Court upheld the due process claim of foster parents in New York that they were entitled to a hearing before their foster children were removed from their custody. This Court recognized there, as it should here, that the kinds of familial ties that trigger constitutionally cognizable liberty interests could emerge out of a foster parent relationship, and that a non-biological family was not simply "a mere collection of unrelated individuals," but rather a unit equivalent to a biological family and worthy of preservation:

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from

> the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship.

Smith, 431 U.S. at 844.

The adoptive parents in this case, if anything, have an even closer relationship to Richard than the plaintiffs in *Smith* had with their foster children, given the temporary nature of the foster parent-child relationship. Nevertheless, the Illinois Supreme Court here, unlike the *Smith* Court, found that the non-biological relationship between Richard and his parents was of no constitutional significance, and that only the biological parent had any constitutionally cognizable interests at stake in Richard's custodial arrangement. In light of *Smith*, this determination was clearly erroneous.

In short, *none* of this Court's cases can be read to stand for the proposition advanced by the Illinois Supreme Court—namely, that the constitutionally protected interests of a biological parent trump all other interests at stake in a custody determination. Indeed, the above decisions point to an outcome precisely the opposite of that reached by the Illinois Supreme Court; *Smith*, *Quilloin*, and *Stanley* all support the notion that family relationships without a biological attachment are *equally* worthy of constitutional protection, and that due process can be achieved for everyone through a full evidentiary hearing on the issue of custody in which all such interests are examined. This is what is required by the Constitution, and this is what the Illinois Supreme Court failed to provide in this case.

II. National Policy Supports Recognition of a Child's Right to a Hearing in Matters Affecting the Child's Emotional and Psychological Relationships

Even if this Court's prior decisions were not controlling in this context, national policy considerations compel the conclusion that a transfer of custody in this case should not take place absent a full hearing that addresses Richard's constitutionally protected liberty interests. As a matter of public policy, the youngest members of our society, who are both vulnerable and without a voice, deserve better protection than the Illinois Supreme Court has provided. Ours is not Roman law, under which a father had complete power over all aspects of his children's lives, including the power to decide whether they should live at all,[1] nor English common law, under which a father had a superior right over the mother to the custody, labor and services of his child, enforceable with little regard to the child's welfare.[2] Under those regimes, a child was considered a financial asset, which the father could sell or transfer as he wished.[3]

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[1] Francis B. McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 Ga. L. Rev. 975 (1988).

[2] *Id.* The parental rights doctrine has long been abandoned in England, its common law birthplace:

> The mere desire of a parent to have his child must be subordinate to the consideration of the welfare of the child, and can be effective only if it coincides with the welfare of the child. Consequently, it cannot be correct to talk of the preeminent position of parents, or their exclusive right to the custody of their children, when the future welfare of those children is being considered by the court.

Lucy S. McCough & Lawrence M. Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 Emory L.J. 209, 245, (1978), *quoting J. v. C.*, 1 All Eng. Rep. 788, 823 (1969).

[3] Suzette M. Haynie, *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?*, 20 Ga. L. Rev. 705 (1986).

In this country, by contrast, recognition of children's rights came to the forefront as early as a century ago and continues to be manifested in legislation prohibiting child abuse,[4] establishing juvenile court systems,[5] requiring primary and secondary education[6] and regulating child labor conditions.[7] Thus, our government has long established its interest in protecting and advancing the welfare of children in numerous different fora. This national interest is not purely altruistic, for when children are mistreated, they grow into maladjusted adults who drain, rather than contribute, to society. Promoting the interests of children ultimately benefits society as a whole. *See Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) ("[A] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.").

This interest in the welfare of children should, and does, extend into the area or family and custodial relationships. It is well recognized in psychiatric circles, and as a matter of common sense, that changes in the custodial arrangement of a child have the potential to cause him or her severe psychological and emotional harm.[8] The develop-

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[4] *See, e.g.*, 1876 N.Y. Laws 96, ch. 122 § 3.

[5] *See, e.g.*, 1899 Ill. Laws 131; *see also* S. Davis, Rights of Juveniles, 233-49 App. 13 (1974).

[6] *See, e.g.*, Mass. Gen. L. ch. 240, §§ 1, 2, 4 (1852); N.Y. C.L.S. Educ. § 3205 (established 1874); *see also Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[7] *See, e.g.*, N.D. Cent. Code § 34-07-01 (1890); Fair Labor Standards Act, 29 U.S.C. § 212 (1938); *see also Prince v. Massachusetts*, 321 U.S. 158 (1944).

[8] *See, e.g.*, James G. O'Keefe, *The Need to Consider Children's Rights in Biological Parent v. Third Party Custody Disputes*, 67 Chicago-Kent L. Rev. 1077, 1102 (1991) (separation or loss in early

(Footnote continued on following page)

ment of the parent-child relationship and the impact of disruption of that relationship has been described in detail as follows:

> The child's psychological tie to a parent figure is not the simple, uncomplicated relationship which it may appear to be at first glance. While it is rooted inevitably in the infant's inability to ensure his own survival, it varies according to the manner in which protection is given and the physical needs fulfilled . . . Where the adult in charge of the child is personally and emotionally involved, a psychological interplay between adult and child will be superimposed on the events of bodily care. . .
>
> Such primitive and tenuous first attachments form the base from which any further relationships develop. What the child brings to them are no longer only his needs for body comfort and gratification but his emotional demands for affection, companionship, and stimulating intimacy. Where these are answered reliably and regularly, the child-parent relationship becomes firm, with immensely productive effects on the child's intellectual and social development. Where parental care is inadequate, this may be matched by deficits in the child's mental growth. *Where there are changes of parent figure or other hurtful interruptions, the child's vulnerability and the fragility of the relationship become evident. The child regresses along the whole line of his affections, skills, achievements, and social adaptation.*

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[8] *continued*

childhood of the attached caregiver relates to conduct problems throughout childhood and later in life, cognitive disturbances, depression, suicide risk, and a generally increased risk of psychiatric disturbance).

J. Goldstein, et al., Beyond The Best Interests of The Child, 17-18 (1979) (emphasis added) (hereinafter, "*Goldstein Text*"). *See also* George A. Awad, *Basic Principles in Custody Assessments*, 23 Can. Psychiatr. Assoc. J. 441, 444 (1978) ("A stable and continuous environment is of paramount importance to the child.").

Thus, it is beyond dispute that the personal security of a child in his family relationship is fundamental to his ultimate social, emotional, and psychological health, and, as a matter of public policy, should be protected. All people, but *especially children*, should be secure in their fundamental relationships. As a matter of public policy, our nation has a strong interest in protecting the peace and tranquility of family relationships and protecting the emotional and psychological relationships of the children. That interest gives rise to the need for full consideration of a child's interests through a full evidentiary hearing before a custody decision is made which may impact on those relationships.

The Illinois Supreme Court, rather than seeking to protect the welfare of Richard and the security of the only family relationships he has known in a manner that would not have prejudiced the constitutional rights of Richard's biological father, instead chose to protect only the property interests of the illegitimate father in his biological offspring. The archaic parental rights doctrine employed by the Illinois Supreme Court gives absolute supremacy to the rights of biological parents. While, as recognized in this Court's precedents, the illegitimate father's rights are certainly deserving of some consideration,[9] they are not so important as to render completely irrelevant the

[9] *See* discussion, *supra*.

compelling interest Richard has in matters affecting his family relationships and psychological health. As the *Goldstein Text* recognizes,

> Whether any adult becomes the psychological parent of a child is based thus on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.

Goldstein Text at 19. It is apparent that, at first blush, Richard's biological father, Otakar Kirchner, fulfills none of the roles of a psychological parent for Richard. Under the circumstances, a full-blown custody hearing is absolutely essential to a full understanding of the impact a custody transfer will have on Richard, as well as on the other interested parties. Awarding Mr. Kirchner custody of Richard may vindicate Kirchner's parental rights, to the extent they exist. However, the Illinois Supreme Court's actions come at the complete expense of a child who had no hand in creating the situation in which he finds himself, and whose development into a mature, responsible adult may be retarded as a result. It is fundamentally wrong, as a matter of policy as well as constitutional law, to require Richard's interests to go unaddressed here, given the potentially devastating impact of a transfer of custody on this innocent child.

Additionally, the Illinois Supreme Court's decision conflicts fundamentally with our national interest in encouraging adoption. Adoption has long been encouraged as a matter of public policy, for obvious reasons, including the need to afford children a stable environment and to avoid the public expense associated with raising children in public institutions or in homes where the children are not

wanted. The Illinois Supreme Court's decision introduces an additional element of risk into the adoption equation which may adversely impact the willingness of potential adoptive parents to take on the responsibility of an unwanted and/or illegitimate child, particularly where the biological father is unidentified. Out-of-wedlock births numbered 1.2 million in 1991, almost one-third of all births in the United States. Fathers were not legally identified in about 65 percent of those births. R. Worthington, *Adding Father to Family: Paternity Laws Take Aim at Poverty*, Chicago Tribune, Feb. 14, 1994, § 1 at 1. A potential adoptive family has no way of knowing whether or when an unidentified biological father may appear at some point in the child's life, claim to have been defrauded by the biological mother, and demand and receive immediate custody of the child. Under the Illinois Supreme Court's decision, the adoptive parents would be required to immediately turn the child over to the biological father. Potential adoptive parents may not be willing to consider for adoption the 65 percent of illegitimate children whose fathers are not identified for fear that those fathers will take the child from them at some point in the future.

Similarly, unwed mothers may be less willing to place a child for adoption if they know that the father, whom they may believe to be unfit, will have an absolute right to custody of the child. The resulting barrier to adoption may have a substantial impact on federal expenditures in areas such as welfare and Medicaid.

These outcomes make no sense as a matter of public policy. Clearly, once an adoption decree has been entered, there are multiple parties with constitutionally cognizable interests in the outcome of any subsequent custody battle, including the child and his adoptive parents, as well as the biological father. At a minimum, both due process and

sound public policy require that each of those parties be heard and the interests of the child considered before an award of custody is made. Only through such a hearing can we vindicate our commitment both to due process for everyone and our historic solicitude for the most helpless and valuable members of our society—our children.

CONCLUSION

The Illinois Supreme Court's decision in this case is troubling in many of its aspects, but none more so than its failure to even consider the due process rights of Richard, a four year old child, to a custody hearing in which his considerable interests, as well as those of the other parties, would be fully considered. The Illinois Supreme Court has entered an order which would destroy the only psychological, emotional, and family relationships that Richard has ever known. This Court has consistently recognized a right to due process when the state invades the province of fundamental family relationships. It is critical that this Court grant *certiorari* in this case to vindicate Richard's constitutionally protected interests and his due process right to a full custody hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kathleen M. O'Laughlin, an attorney, certify that a true and correct copy of the foregoing Motion for Leave to File Brief and Brief Amicus Curiae of Honorable Paul Simon, United States Senator, Honorable Carol Moseley-Braun, United States Senator, The American Academy of Child and Adolescent Psychiatry, and the American Academy of Pediatrics in Support of Petition for Certiorari of Baby Richard was served upon:

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by placing a copy of the same in the United States Mail, with first-class postage properly prepaid, this 11th day of May, 1995.